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<sup>19</sup>  
**REPORTS OF CASES**

**DECIDED IN THE**

**COURT OF APPEAL,**

**DURING PARTS OF THE YEARS 1882 & 1883.**



**REPORTED UNDER THE AUTHORITY OF  
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# A TABLE

## OF THE

### CASES REPORTED IN THIS VOLUME.

| A.  | Page | D.   | Page    |
|---|------|--|---------|
| Allan v. McTavish .....                               | 440  | Danford v. Danford .....   | 518     |
| Anderson v. Bell .....                                | 531  | Devanney v. Brownlee et al. ....                                   | 355     |
| Archer v. Severn .....                                | 725  | Direct U. S. Cable Co., The, v. The<br>Dominion Telegraph Co. .... | 416     |
| B.  |      | Dominion Fire and Marine Ins. Co.,<br>Howes v. ....                | 644     |
| Badenach v. Slater .....                              | 402  | Dominion Telegraph Co., The, The<br>Direct U. S. Cable Co. v. .... | 416     |
| Bank of Ottawa v. McLaughlin ..                       | 543  | Dumble v. Dumble .....   | 476     |
| Bell, Anderson v. ....                                | 531  | Dunnville, Corporation of, Silsby v..                              | 524     |
| Bell, Crathern et al. v. ....                         | 537  | Driscoll v. Green et al. ....                                      | 366     |
| Bell v. Lee .....                                     | 185  | F.   |         |
| Board of Education of Morrisburgh,<br>In re .....     | 169  | Fleming v. McNabb .....  | 656     |
| Boswell v. Sutherland .....                           | 233  | G.   |         |
| Boucher, Cochrane v. ....                             | 555  | Garland et al., McMaster v. ....                                   | 1       |
| Bowen, Totten v. ....                                 | 602  | Glass, Boyd et al. v. ....   | 632     |
| Boyd et al. v. Glass .....                            | 632  | Gooderham v. Toronto and Nipissing<br>R. W, Co. ....               | 685     |
| Buist v. McCombe et al. ....                          | 598  | Grand Trunk R. W. Co., Monkhouse<br>v. ....                        | 637     |
| Brownlee et al., Devanney v. ....                     | 355  | Grand Trunk R. W. Co. Rosenberger<br>v. ....                       | 482     |
| C.  |      | Green et al., Driscoll v. ....                                     | 366     |
| Canada Central Railway v. McLaren                     | 564  | H.   |         |
| Canada Farmers' Ins. Co., Lowson et<br>al. v. ....    | 613  | Hale v. Kennedy ..   | 157     |
| Canada Landed Credit Co. v. Thomp-<br>son et al. .... | 696  | Hall, In re .....  | 31, 135 |
| Canada Life Assurance Co., Russell<br>v. ....         | 716  | Hedstrom v. Toronto Car Wheel Co.                                  | 627     |
| Canadian Bank of Commerce v.<br>Woodward et al. ....  | 347  | Howarth v. Singer Manufacturing Co                                 | 264     |
| Cochrane v. Boucher .....                             | 555  | Howes v. Dominion Fire and Marine<br>Ins. Co .....                 | 644     |
| Cooper, Saylor v. ....                                | 707  |  |         |
| Crathern et al. v. Bell .....                         | 537  |  |         |

| K.  |      | P.  |      |
|---|------|---|------|
|   | Page |   | Page |
| Kennedy, Hale v. ....   | 157  | Peck, Powell v. ....  | 498  |
| King and Albion, Townships of, Maw<br>v. ....   | 249  | Phipps, In re ....  | 77   |
|   |      | Powell v. Peck ....   | 498  |
| L.  |      | Q.  |      |
| Laplante v. Scamen et al. ....  | 557  | Quinlan v. The Union Fire Ins. Co..                               | 376  |
| Lash v. The Meriden Britannia Co..  | 680  |   |      |
| Lee, Bell v. ....   | 185  | R.  |      |
| Lowson et al. v. Canada Farmers'<br>Ins. Co. ....   | 613  | Rosenberger v. Grand Trunk R. W.<br>Co. ....                      | 482  |
| M.  |      | Russell v. Canada Life Assurance Co                               | 716  |
| Macnamara v. McLay ....   | 319  | S.  |      |
| Martin v. McAlpine ....   | 675  | Saylor v. Cooper. ....  | 707  |
| Maw v. King and Albion ....   | 249  | Scamen et al, Laplante v. ....                                    | 557  |
| Merchants' Bank, Smith v. ....  | 15   | Severn, Archer v, ....  | 725  |
| Meriden Britannia Co., The, Lash v.   | 680  | Silsby v. The Corporation of Dunn-<br>ville ....                  | 524  |
| Monkhouse v. Grand Trunk R. W.<br>Co. ....  | 637  | Singer Manufacturing Co., Howarth<br>v. ....                      | 264  |
| Morrisburgh, Board of Education of<br>the Village of, and the Municipal<br>Corporation of the Township of<br>Winchester, In re .... | 169  | Slater, Badenach v. ....  | 402  |
| Murray v. McCallum. ....  | 277  | Smith v. The Merchants' Bank ....                                 | 15   |
| Mc.   |      | Stammers v. O'Donohoe ....  | 161  |
| McAlpine, Martin v. ....  | 675  | Sutherland, Boswell v. ....                                       | 233  |
| McArthur, McDonald v. ....  | 553  | T.  |      |
| McCallum, Murray v. ....  | 277  | Thompson et al., Canada Landed<br>Credit Co. v. ....              | 696  |
| McCombe, Buist v. ....  | 598  | Toronto Car Wheel Co., Hedstrom v.                                | 627  |
| McDonald v. McArthur ....   | 553  | Toronto and Nipissing R. W. Co.,<br>Gooderham v. . ....           | 685  |
| McDougall, In re ....   | 309  | Totten v. Bowen. ....   | 602  |
| McLaren, Canada Central R. W. Co.<br>v. ....  | 564  | U.  |      |
| McLaughlin, Bank of Ottawa v. ....  | 543  | Union Fire Ins. Co., Quinlan v. ....                              | 376  |
| McLay, Macnamara v. ....  | 319  | W.  |      |
| McMaster v. Garland et al. ....   | 1    | Ward, Wiltsie v. ....   | 549  |
| McNabb, Fleming v. ....   | 656  | Wiltsie v. Ward. ....   | 549  |
| McTavish, Allan v. ....   | 440  | Winchester, Township of and Village<br>of Morrisburgh, In re .... | 169  |
| N.  |      | Woodward et al., Canadian Bank of<br>Commerce v. ....             | 347  |
| Newhouse, Oliver v. ....  | 122  |   |      |
| O.  |      |   |      |
| O'Donohoe, Stammers v. ....   | 161  |   |      |
| Oliver v. Newhouse ....   | 122  |   |      |
| Ottawa, Bank of, v. McLaughlin. ....  | 543  |   |      |

# A TABLE

## OF THE

### NAMES OF CASES CITED IN THIS VOLUME.

| A.   |                                     |              |
|--|-------------------------------------|--------------|
| NAMES OF CASES CITED.                                | WHERE REPORTED.                     | Page of Vol. |
| Acre v. Livingston.....                              | 26 U. C. R. 288.....                | 712          |
| Adams v. Loomis .....                                | 22 Gr. 99 ; S. C. 24 ; Gr. 242..... | 362          |
| Alderson v. Maddison .....                           | 5 Ex. D. 299 .....                  | 500          |
| Aleyn v. Belchier .....                              | 1 W. & T. L. C. 339 ; 1 Eden 132..  | 224          |
| Allan v. Fisher .....                                | 16 C. P. 63 .....                   | 660          |
| Allan v. Gomme .....                                 | 11 A. & E. 759 .....                | 707          |
| Allen v. Richardson .....                            | 13 Ch. D. 536 .....                 | 501          |
| Alton v. Harrison .....                              | L. R. 4 Chy. 625.....               | 459          |
| Ancona v. Rogers .....                               | 1 Ex. D. 285.....                   | 3            |
| Anderson v. Morice .....                             | L. R. 1 App. Cas. 750 .....         | 140          |
| Anderson v. Fitzgerald.....                          | 4 H. L. C. 484.....                 | 384          |
| Anderson v. Thornton .....                           | 8 Ex. 425 .....                     | 384          |
| Anderson v. Pacific Fire and Marine Ins.<br>Co ..... | L. R. 7 C. P. 65 .....              | 384          |
| Appleby v. Meyers.....                               | L. R. 2 C. P. 651 .....             | 235          |
| Armington v. Houston .....                           | 38 Verm. 448.....                   | 127          |
| Ashton v. Blackshaw.....                             | L. R. 9 Eq. 510 .....               | 608          |
| Ashworth v. Outram.....                              | 5 Ch. D. 923 .....                  | 283          |
| Atkinson v. Ritchie .....                            | 10 East 533.....                    | 234          |
| Attorney-General v. Parnter.....                     | 3 Br. C. C. 443 .....               | 207          |

| B.  |                         |     |
|---|-------------------------|-----|
| Baily v. Stephens .....                                   | 12 C. B. N. S. 91 ..... | 707 |
| Bailey v. De Crespigny .....                              | L. R. 4 Q. B. 185 ..... | 234 |
| Baines v. Ewing.....                                      | L. R. 1 Ex. 320 .....   | 384 |
| Bainfield, Re, Ex parte Newport Credit<br>Co .....        | 20 W. R. 925 .....      | 3   |
| Baker v. Lee .....  | 8 H. L. C. 512.....     | 140 |
| Baker v. Dawbarn .....                                    | 19 Gr. 113 .....        | 404 |
| Baker et al. v. London and South-Western<br>R. W. Co..... | L. R. 3 Q. B. 91 .....  | 578 |
| Ballagh v. Royal Mutual .....                             | 5 A. R. 87.....         | 616 |
| Baltimore and Susquehanna R. W. Co. v.<br>Woodruff .....  | 4 Md. R. 242 .....      | 571 |
| Bank of British North America v. Clark-<br>son.....       | 9 C. P. 182 .....       | 21  |
| Bank of Toronto v. McDougall .....                        | 15 C. P. 475 .....      | 611 |
| Banks v. Goodfellow .....                                 | L. R. 5 Q. B. 557 ..... | 188 |
| Barnum v. The State of Ohio .....                         | 15 Ohio 717 .....       | 60  |
| Barrett, Re .....   | 5 A. R. 206 .....       | 23  |
| Baum, Re, Ex parte Cooper.....                            | 10 Ch. D. 331 .....     | 3   |



| NAMES OF CASES CITED.  | WHERE REPORTED.                     | Page of Vol. |
|--|-------------------------------------|--------------|
| Bayspoole v. Collins .....   | L. R. 6 Chy, 228.....               | 469          |
| Beamish v. Beamish .....   | 9 H. L. C. 274 ; 8 Jur. N. S. 770.. | 137          |
| Beavan v. Lord Oxford .....  | 6 D. M. & G. 507 .....              | 5            |
| Beeching, Ex parte.....  | 4 B. & C. 136 .....                 | 145          |
| Belshaw v. Bush.....   | 11 C. B. 191 .....                  | 348          |
| Bennett v. Cooper .....  | 9 Beav. 252 .....                   | 8            |
| Benson v. Ottawa Agricultural Ins. Co..                              | 29 C. P. 308 .....                  | 380          |
| Besley v. Besley .....   | 9 Ch. D. 163 .....                  | 498          |
| Bessett, Ex parte .....  | 6 Q. B. 481 .....                   | 144          |
| Biles v. Commonwealth.....   | 8 Casey 529 .....                   | 32           |
| Billington v. The Provincial Ins. Co ....                            | 2 A. R. 158 .....                   | 379          |
| Blackmore v. Toronto Street R. W. Co..                               | 38 U. C. R. 172.....                | 250          |
| Blain v. Oliphant .....  | 7 U. C. R. 473.....                 | 554          |
| Blake v. Mowatt.....   | .....                               | 397          |
| Bland v. Eaton .....   | 6 A. R. 83 .....                    | 167          |
| Bleakly v. Niagara District Mutual Ins.<br>Co .....                  | 16 Gr. 198 .....                    | 384          |
| Blockley v. Slater .....   | 1 Lutw. 119 .....                   | 711          |
| Blyth v. The Birmingham Water Works<br>Co .....                      | 11 Ex. 781 .....                    | 567          |
| Boast v. Firth.....  | L. R. 4 C. P. 1 .....               | 235          |
| Eolton v. Bolton.....  | 11 Ch. D. 970 .....                 | 715          |
| Bool v. Mix.....   | 17 Wend. 199 .....                  | 533          |
| Borrowman v. Drayton.....  | 2 Ex. D. 15 .....                   | 631          |
| Boughton v. Knight .....   | L. R. 3 P. & D. 64.....             | 188          |
| Bowen v. Marres.....   | 1 Cr. & Ph. 356 .....               | 366          |
| Bowes v. Shand .....   | L. R. 2 App. Cas. 455 .....         | 630          |
| Boyle v. Dundas.....   | 27 C. P. 129 .....                  | 250          |
| Boyse v. Rossborough .....   | 6 H. L. C. 2.....                   | 186          |
| Bradley v. Brown .....   | 32 U. C. R. 463.....                | 250          |
| Brayley v. Ellis .....   | 1 O. R. 119 .....                   | 608, 676     |
| Bridges v. North London R. W. Co ....                                | L. R. 7 H. L. 113 .....             | 251          |
| Bright v. Hutton .....   | 3 H. L. C. 34 .....                 | 138          |
| Brogan v. Manufacturers' and Merchants'<br>Mutual Fire Ins. Co ..... | 29 C. P. 414 .....                  | 381          |
| Brooks v. Ricknell .....   | 4 McLean 64 .....                   | 498          |
| Brooks and Haldimand, Re.....  | 41 U. C. R. 393 .....               | 181          |
| Browne, Re .....   | 31 C. P. 493 ; 6 A. R. 396..        | 33           |
| Bull v. Harper.....  | 6 P. R. 36.....                     | 559          |
| Burn v. Blecher .....  | 14 C. P. 415 .....                  | 545          |
| Burns v. Carvalho .....  | 4 M. & C. 690 .....                 | 6            |
| Burns v. Toronto .....   | 42 U. C. R. 569.....                | 251          |
| Burton v. Bellhouse .....  | 20 U. C. R. 60 .....                | 7            |

## C.

|   |                          |     |
|---|--------------------------|-----|
| Caldwell, Re .....                                  | 5 P. R. 217 .....        | 100 |
| Campbell v. The National Life Assurance<br>Co ..... | 24 C. P. 133 .....       | 265 |
| Canning, Ex parte, In re Steele .....               | L. R. 16 Eq. 414..       | 3   |
| Canniff v. Bogart .....                             | 6 C. P. 474 .....        | 362 |
| Carne v. Mitchell .....                             | 10 Jur. 909.....         | 498 |
| Carpenter v. Griffin .....                          | 9 Paige 314 n.....       | 127 |
| Carr v. London & North-Western R. W.<br>Co .....    | L. R. 10 C. P. 307 ..... | 125 |
| Carscallen v. Moodie.....                           | 15 U. C. R. 92 .....     | 125 |
| Carver v. Richards.....                             | 1 DeG. F. & J. 548.....  | 187 |
| Case v. Bedfield .....                              | 4 McLean 526 .....       | 498 |
| Castellain v. Preston .....                         | 11 Q. B. D. 380.....     | 649 |

# CASES CITED.

xi

| NAMES OF CASES CITED.                                | WHERE REPORTED.           | Page of Vol. |
|--|---------------------------|--------------|
| Castor v. Uxbridge.....                              | 39 U. C. R. 113.....      | 250          |
| Catling v. King .....                                | 5 Ch. D. 660 .....        | 167          |
| Cazenove v. British Assurance Co .....               | 6 C. B. N. S. 437.....    | 384          |
| Chamberlain and Stormont, Re .....                   | 45 U. C. R. 26 .....      | 177          |
| Chamberlain v. Trenough.....                         | 23 C. P. 497 .....        | 240          |
| Champion, Ex parte .....                             | 3 Br. C. C. 436 .....     | 312          |
| Charlwood v. Greig .....                             | 3 C. & K. 46 .....        | 572          |
| Chatillon v. Canadian Mutual Fire Ins.<br>Co.....    | 27 C. P. 450 .....        | 380          |
| Clarke v. Morell.....                                | 21 U. C. R. 596.....      | 125          |
| Clayards v. Dethick .....                            | 12 Q. B. 439 .....        | 263          |
| Clementson v. Grand Trunk R. W. Co..                 | 42 U. C. R. 253.....      | 4            |
| Clifford v. Watts .....                              | L. R. 5 C. P. 577 .....   | 235          |
| Clum v. Brewer .....                                 | 3 Curtis 506.....         | 498          |
| Cobbett v. Slowman .....                             | 9 Ex. 633 .....           | 145          |
| Coffin v. Cooper .....                               | 14 Ves. 205.....          | 559          |
| Collins v. Evans .....                               | 5 Q. B. 820 .....         | 700          |
| Commonwealth v. Baldwin .....                        | 11 Gray 197 .....         | 106          |
| Commonwealth v. Wilson .....                         | .....                     | 106          |
| Concord Union Mutual Ins. Co. v. Wood-<br>bury ..... | 45 Maine 447.....         | 647          |
| Connecticut Mutual Life Ins. Co. v. Moore            | L. R. 6 App. Ca. 656..... | 568          |
| Constable v. Taffnell .....                          | 4 Hagg. 465.....          | 186          |
| Coogan's Case .....                                  | 1 Leach 448.....          | 57, 105      |
| Cook v. Fowler .....                                 | L. R. 7 H. L. 27.....     | 466          |
| Cotter v. Sutherland.....                            | 18 C. P. 357 .....        | 660          |
| Cox, Ex parte .....                                  | 1 Ch. D. 302 .....        | 608          |
| Cox v. Mitchell .....                                | 7 C. B. N. S. 55 .....    | 437          |
| Crafter v. The Metropolitan R. W. Co ..              | 12 Jur. N. S. 272 .....   | 489          |
| Crampton v. Varna R. W. Co.....                      | L. R. 7 Ch. 562 .....     | 265          |
| Cripps v. Wolcott .....                              | 4 Madd. 11 .....          | 476          |
| Currie v. Missa.....                                 | L. R. 10 Ex. 163.....     | 351          |
| Cushman v. Reid .....                                | 20 C. P. 147 .....        | 551          |

## D.

|  |                            |          |
|--|----------------------------|----------|
| DaCosta v. Kier .....                                      | 3 Russ. 360 .....          | 476      |
| Dale's Case .....  | 6 Q. B. D. 376.....        | 150      |
| Daniel v. Bond .....                                       | 9 C. B. N. S. 716 .....    | 578      |
| Daniel v. Warren .....                                     | 2 Y. & Col. C. C. 290..... | 476      |
| Dansey v. Richardson .....                                 | 3 E. & B. 722 .....        | 140      |
| Daubeney v. Cockburn .....                                 | 1 Mer. 626 .....           | 187      |
| Davidson v. Ross .....                                     | 24 Gr. 22.....             | 611      |
| Davis v. Marshall .....                                    | 9 W. R. 520.....           | 268      |
| Deacon v. Drifil.....                                      | 4 A. R. 335 .....          | 311, 404 |
| Deighton v. Greenville .....                               | 1 Show. 36 .....           | 141      |
| Deverill v. Grand Trunk R. W. Co .....                     | 25 U. C. R. 517.....       | 250      |
| Dew v. Clark .....   | 3 Add. 79 and 181 .....    | 188      |
| Dexter v. Norton .....                                     | 47 N. Y. Rep. 62 .....     | 235      |
| Dingman v. Austin .....                                    | 33 U. C. R. 190.....       | 362      |
| Dobell v. Hutchinson.....                                  | 3 A. & E. 355 .....        | 166      |
| Doe d. Upper v. Edwards.....                               | 5 U. C. R. 594.....        | 660      |
| Dominus Rex v. MacIntosh.....                              | 1 Str. 308 .....           | 145      |
| Dougherty v. Williams.....                                 | 32 U. C. R. 215.....       | 720      |
| Duberley v. Gunning.....                                   | 4 T. R. 657 .....          | 251      |
| Dublin, Wicklow and Wexford R. W. Co.<br>v. Slattery ..... | L. R. 3 App. C. 1176 ..... | 250, 484 |
| Duncan v. Cashin .....                                     | L. R. 10 C. P. 554 .....   | 4, 283   |
| Dunn's Case.....   | 1 Leach C. C. 57.....      | 41       |
| Durant v. Essex Company .....                              | 7 Wallace 107 .....        | 155      |

| E.   |                                     |              |
|--|-------------------------------------|--------------|
| NAMES OF CASES CITED.                                | WHERE REPORTED.                     | Page of Vol. |
| Eames v. Howe Ins. Co. of New York ..                | 94 U. S. 630 .....                  | 380          |
| East London Water Co. v. Bailey .....                | 4 Bing. 283 .....                   | 265          |
| Edinburgh Life Assurance Co. v. Fergus-<br>son ..... | 34 U. C. R. 253.....                | 660          |
| Edwards v. Glyn.....                                 | 2 E. & E. 29.....                   | 678          |
| Edwards v. Edwards .....                             | 2 Ch. D. 291, 15 Beav. 357, .....3, | 476          |
| Edwards v. Harben .....                              | 2 T. R. 587 .....                   | 457          |
| Ellis v. Emmanuel .....                              | 1 Ex. D. 157 .....                  | 541          |
| Ellis v. Silber .....                                | L. R. 8 Ch. 83.....                 | 317          |
| Emerson v. Heelis .....                              | 2 Taunt. 38 .....                   | 163          |
| Emmett v. Tottenham .....                            | 8 Ex. 884 .....                     | 554          |
| Exchange Bank v. Springer.....                       | 29 Gr. 270 .....                    | 438          |

## F.

|   |                                 |     |
|---|---------------------------------|-----|
| Farmer v. Martin .....  | 2 Sim. 502 .....                | 187 |
| Farquhar v. Toronto .....   | 12 Gr. 186 .....                | 4   |
| Fenner v. The London and South-Eastern<br>R. W. Co .....                        | L. R. 6 Q. B. 769 .....         | 570 |
| Fenton v. McWain.....   | 41 U. C. R. 239.....            | 660 |
| Field v. McArthur .....   | 27 C. P. 15.....                | 362 |
| Fiske v. Brooke... ..   | 4 A. R. 98.....                 | 473 |
| Fissel's Appeal .....   | 27 Penn. 52 .....               | 533 |
| Fitzgerald v. Grand Trunk R. W. Co....  | 4 A. R. 623 .....               | 404 |
| Fleming v. Orr .....  | 2 MacQ. 14 .....                | 572 |
| Ford v. Cotesworth .....  | L. R. 4 Q. B. 134.....          | 234 |
| Foster v. Pettibone .....   | 3 Selden 433.....               | 125 |
| Foster v. Smith .....   | 13 U. C. R. 243 .....           | 126 |
| Foulds v. Curtelett.....  | 21 C. P. 368 .....              | 283 |
| Fowler v. Foster.....   | 5 Jur. N. S. 99 .....           | 608 |
| Fowles v. Davidson .....  | 6 Notes of Cases, 461, 473..... | 210 |
| Frankford, &c., Turnpike Co. v. The Phil-<br>adelphia and Trenton R. W. Co..... | 54 Penn. St. 345 .....          | 567 |
| Franklin v. Atlantic Fire Ins. Co .....   | 42 Mo. 456.....                 | 380 |
| Fraser v. Fraser .....  | 14 C. P. 77.....                | 713 |
| Frazier v. Lazier.....  | 9 U. C. R. 679.....             | 125 |
| Frazier v. McFarland... ..  | 43 U. C. R. 281.....            | 363 |
| Freeman v. Pope.....  | L. R. 9 Eq. 206 .....           | 458 |
| Frith v. Forbes .....   | 4 Deg. F. & J. 409 .....        | 11  |

## G.

|  |                                      |     |
|--|--------------------------------------|-----|
| Galland v. Leonard .....               | 1 Swans. 161 .....                   | 476 |
| Geach v. Ingall .....                  | 14 Ma. & W. 95.....                  | 384 |
| Gear v. Grosvenor .....                | 1 Holmes 215 .....                   | 498 |
| Gearing, Re .....                      | 4 A. R. 173 .....                    | 283 |
| Gee v. Metropolitan R. W. Co .....     | L. R. 8 Q. B. 168 .....              | 250 |
| Gibson v. South Eastern R. W. Co ..... | 1 F. & F. 23.....                    | 583 |
| Gildersleeve v. Ault .....             | 16 U. C. R. 401.. ..                 | 4   |
| Gilbert v. Berkinshaw .....            | Lofft 771 .....                      | 251 |
| Glengall v. Barnard .....              | 1 Keene 787 .....                    | 163 |
| Goldsmith v. Russel .....              | 5 D. M. & G. 547 .....               | 444 |
| Gore Bank v. Sutherland .....          | 1 U. C. L. J. N. S. 159.....         | 404 |
| Gorris v. Scott.....                   | L. R. 9 Ex. 125 .....                | 493 |
| Gotwalls v. Mulholland .....           | 15 C. P. 62, 3 E. & A. 194, ... 125, | 412 |
| Gowan v. Paton .....                   | 27 Gr. 48 .....                      | 699 |
| Grant v. Eddy.....                     | 21 Gr. 45, 568 .....                 | 438 |

# CASES CITED.

xiii

## G.

| NAMES OF CASES CITED.       | WHERE REPORTED.         | Page of Vol. |
|-----------------------------|-------------------------|--------------|
| Grant v. VanNorman.....     | 7 A. R. 526 .....       | 675          |
| Grant v. Wilson .....       | 17 U. C. R. 144.....    | 4            |
| Gray v. Richford.....       | 2 S. C. 431 .....       | 142          |
| Green v. Elgie.....         | 5 Q. B. 99.....         | 601          |
| Greenwood v. Greenwood..... | 3 Curt. App. 24 .....   | 188          |
| Grey v. Pearson .....       | 6 H. L. C. 61 .....     | 476          |
| Griffin v. Patterson .....  | 45 U. C. R. 536.....    | 363          |
| Griffin v. Weatherly .....  | L. R. 3 Q. B. 753 ..... | 4            |
| Griffiths v. Owen, .....    | 13 M. & W. 58 .....     | 348          |
| Gurnell v. Gardner.....     | 9 Jur. N. S. 1220 ..... | 8            |
| Gurney et al v. James ..... | 19 U. C. R. 156.....    | 4            |

## H.

|  |                                    |        |
|--|------------------------------------|--------|
| Hall, Re .....   | Ante p. 31 .....                   | 105    |
| Hall, Re v. Eggleton .....                                 | 22 C. P. 536 .....                 | 660    |
| Hamilton v. Banting .....                                  | 13 Gr. 483 .....                   | 498    |
| Hamilton v. Harrison.....                                  | 46 U. C. R. 127.....               | 7      |
| Hamilton v. Johnson.....                                   | 5 Q. B. D. 263.....                | 484    |
| Hamilton Provident and L. Society v. Bell                  | 29 Gr. 203 .....                   | 701    |
| Hammersmith R. W. Co. v. Brand.....                        | 4 H. L. 204, 210.....              | 616    |
| Handley v. Stacey .....                                    | 1 F. & F. 574 .....                | 186    |
| Harley v. Greenwood.....                                   | 5 B. & Ald. 101 .....              | 437    |
| Harris v. Commercial Bank.....                             | 16 U. C. R. 437.....               | 7, 126 |
| Harris v. Mobbs.....                                       | 3 Ex. D. 268.....                  | 484    |
| Harrison's Case .....                                      | 1 Leach 180 .....                  | 32     |
| Harrison v. Douglas .....                                  | 40 U. C. R. 410.....               | 283    |
| Hartford Ins. Co. v. Harmer .....                          | 2 Ohio St. 452.....                | 386    |
| Harvey v. Wilde .....                                      | L. R. 14 Eq. 438.....              | 443    |
| Harwood v. Baker .....                                     | 3 Moo. P. C. 282.....              | 189    |
| Hawkins v. Gathercole.....                                 | 6 D. M. & G. 21.....               | 494    |
| Hedger v. Stevenson .....                                  | 2 M. & W. 799 .....                | 554    |
| Heron v. Stokes .....                                      | 1 Dr. & War. 89.....               | 533    |
| Hewlins v. Shippam .....                                   | 5 B. & C. 229 .....                | 712    |
| Heywood et al v. Dodson and Lawley..                       | 44 L. T. R. 285.....               | 585    |
| Hickman v. Cox.....  | 3 C. B. N. S. 568.....             | 141    |
| Hill v. Barclay.....                                       | 17 Ves. 56 .....                   | 498    |
| Hill v. Portland R. W. Co. ....                            | 55 Maine 438 .....                 | 492    |
| Hitchcock v. Ives .....                                    | Draper 259 .....                   | 599    |
| Holme v. Brunskill.....                                    | 3 Q. B. D. 495.....                | 128    |
| Holmes v. Penney .....                                     | 3 K. & J. 90.....                  | 459    |
| Holmes v. Seller.....                                      | 3 Lev. 305.....                    | 712    |
| Horsley v. Cox .....                                       | L. R. 4 Chy. 92 .....              | 473    |
| Horn v. Pillans .....                                      | 2 M. & K. 15 .....                 | 476    |
| House v. Merriam .....                                     | 2 Greenl. 375 .....                | 660    |
| Howell v. Coupland .....                                   | L. R. 9 Q. B. 462 ; 1 Q. B. D. 250 | 239    |
| Hughes v. The Canada Permanent Build-<br>ing Society ..... | 39 U. C. R. 221.....               | 265    |
| Hunt v. Wimbledon .....                                    | 4 C. P. D. 53 .....                | 528    |
| Hurd v. West.....  | 7 Cowen 752.....                   | 127    |
| Hutchinson v. Lord .....                                   | 1 Wis. 286 .....                   | 409    |
| Hutton v. Uphill .....                                     | 2 H. L. C. 674.....                | 139    |
| Hutton v. Windsor.....                                     | 34 U. C. R. 487.....               | 250    |
| Hyde v. Cookson .....                                      | 21 Barb. N. Y. 93.....             | 125    |

## I.

|                                 |                        |     |
|---------------------------------|------------------------|-----|
| Ingram v. Soutten .....         | L. R. 7 H. L. 408..... | 476 |
| Ionides v. Pacific Ins. Co..... | L. R. 6 Q. B. 674..... | 384 |

| I.  |  |              |
|---|--|--------------|
| NAMES OF CASES CITED.                     | WHERE REPORTED.  | Page of Vol. |
| Irving v. Richardson .....                | 2 B. & Ald. 193 .....                                    | 649          |
| Irwin v. Harrington .....                 | 12 Gr. 179 .....   | 660          |
| Irwin v. Maughan .....                    | 26 C. P. 455 .....                                       | 283          |
| J.  |  |              |
| Jackson v. Jackson .....                  | 1 Dru. 91 .....  | 187          |
| Jackson v. Lowe .....                     | 1 Bing 9 .....   | 165          |
| Jackson v. Hyde .....                     | 28 U. C. R. 294 .....                                    | 250          |
| Jacobs v. Latour .....                    | 3 Bing 100 .....   | 4            |
| Jenkins v. Bethem .....                   | 15 C. B. 168 .....                                       | 701          |
| Johnson, In re—Golden v. Gillam .....     | 20 Ch. D. 389 .....                                      | 471          |
| Johnson v. Raylton .....                  | 7 Q. B. D. 438 .....                                     | 630          |
| Jones v. Palmer .....                     | 1 Leach 367 ; 2 East P. C. 853 .....                     | 57           |
| Jones v. St. John's College .....         | L. R. 6 Q. B. 115 .....                                  | 234          |
| Jordan v. Adams .....                     | 9 C. B. N. S. 505 .....                                  | 143          |
| Jungbluth v. Way .....                    | 1 H. & N. 71 .....                                       | 554          |
| K.  |  |              |
| Kendrick v. Lomax .....                   | 2 Tyr. 438 .....   | 348          |
| Kent v. Riley .....                       | L. R. 14 Eq. 190 .....                                   | 459          |
| Keough v. Price .....                     | 27 C. P. 309 .....                                       | 374          |
| Kerr v. Hastings Mutual Fire Ins. Co ..   | 41 U. C. R. 217 .....                                    | 381          |
| Kerr v. Stripp et al .....                | 40 U. C. R. 125 .....                                    | 363          |
| Keven v. Crawford .....                   | L. R. 6 Ch. D. 29 .....                                  | 470          |
| Kincaid v. Kincaid .....                  | 6 P. R. 93 .....   | 559          |
| King, The v. St. Michaels .....           | Doug. 630 .....  | 445          |
| King, The v. Ward .....                   | 2 Ld. Raym. 1461 .....                                   | 38           |
| L.  |  |              |
| LaBanque Jacques Cartier v. Strachan ..   | 5 P. R. 159 .....  | 554          |
| LaPorte v. Costic .....                   | 31 L. T. N. S. 434 .....                                 | 283          |
| Lamirande's Case .....                    | 10 L. C. R. 780, 2 C. L. J. 283, 4<br>C. L. J. 438 ..... | 32           |
| Langstaffe, Re .....                      | 2 Gr. 165 .....  | 311          |
| Laughter v. Monox .....                   | 5 Rep. 21 .....  | 238          |
| Lawson v. Laidlaw et ux .....             | 3 A. R. 77 .....   | 362          |
| Lax v. Darlington .....                   | 5 E. D. 28 .....   | 252          |
| Lee v. Fernie .....                       | 1 Beav. 483 .....  | 187          |
| Legg v. Evans .....                       | 6 M. & W. 367 .....                                      | 4            |
| Lett v. Morris .....                      | 4 Sim. 607 .....   | 8            |
| Ley v. Wright .....                       | 27 C. P. 52 .....  | 658          |
| Lincoln v. Pelham .....                   | 10 Ves. 166 .....  | 533          |
| Linford v. Provincial, &c., Ins. Co ..... | 34 Beav. 291 .....                                       | 384          |
| Litchfield v. White .....                 | 3 Sandford 545 ; 3 Selden 438 .....                      | 406          |
| Lloyd v. Attwood .....                    | 3 DeG. & J. 614 .....                                    | 459          |
| Lomax, Re .....                           | 42 L. T. 391 .....                                       | 434          |
| London Assurance Co. v. Mansel .....      | 11 Ch. D. 363 .....                                      | 721          |
| London Gaslight Co. v. Chelsea .....      | 6 C. B. N. S. 411 .....                                  | 578          |
| Long v. Ovenden .....                     | 16 Ch. D. 691 .....                                      | 197          |
| Lingmore v. Great Western R. W. Co ..     | 19 C. B. N. S. 183 ..                                    | 489          |
| Lount v. The Canada Farmers' Ins. Co ..   | 8 P. R. 433 .....  | 616          |
| Lovell v. Newton .....                    | 4 C. P. D. 7 .....                                       | 283          |
| Lowndes v. Collens .....                  | 17 Ves. 27 .....   | 311          |
| Luberg v. Commonwealth .....              | Crim. Law Mag. ....                                      | 32           |
| Lucas v. Moore .....                      | 3 A. R. 610 .....  | 251          |
| Lumley v. Musgrove .....                  | 4 Bing. N. C. 9 .....                                    | 348          |
| Lumley v. Timms .....                     | 28 L. T. N. S. 608 .....                                 | 283          |

# CASES CITED.

XV

## M.

| NAMES OF CASES CITED.                                   | WHERE REPORTED.                   | Page of Vol. |
|---|-----------------------------------|--------------|
| Mackay, Exp .....                                       | L. R. 8 Ch. 643 .....             | 3            |
| Macdonald v. Law Union Ins. Co .....                    | L. R. 9 Q. B. 338.....            | 384          |
| Maennel v. Murdock .....                                | 13 Md. 164.....                   | 407          |
| Mahoney v. The National Widow's Life<br>Ass. Fund ..... | L. R. 6 C. P. 252.....            | 569          |
| Mallory v. Willis .....                                 | 4 Comstock 76.....                | 125          |
| Malmesbury R. W. Co. v. Budd.....                       | 2 Ch. D. 113 .....                | 435          |
| Mali Iro, The .....                                     | L. R. 2 Ad. & E. 356.....         | 436          |
| Manchester Railway v. Fullarton .....                   | 14 C. B. N. S. 54 .....           | 492          |
| Manson v. Thacker.....                                  | 7 Ch. D. 620 .....                | 498          |
| Martin v. Martin.....                                   | 12 Gr. 500 .....                  | 186          |
| Martin, Re .....  | 4 U. C. L. J. N. S. 199.....      | 100          |
| Marshall v. Columbian &c. Ins. Co .....                 | 27 N. H. 157.....                 | 381          |
| Mason v. Agricultural Ins. Co.....                      | 16 C. P. 493; 18 C. P. 19 .....   | 384          |
| Masuret v. Mitchell .....                               | 26 Gr. 435 .....                  | 125          |
| Maulson et al. v. The Commercial Bank.....              | 17 N. C. R. 30 .....              | 4, 126       |
| Maunsell v. Hedges .....                                | 4 H. L. Ca. 1056.....             | 498          |
| May v. Security Loan and Savings Co ..                  | 46 U. C. R. 106.....              | 7            |
| May v. Buck Eye &c. Ins. Co.....                        | 25 Wis. 291 .....                 | 381          |
| Meakin v. Samson .....                                  | 28 C. P. 355 .....                | 283          |
| Merchants' Express Co. v. Morton.....                   | 15 Gr. 274 .....                  | 678          |
| Meriden Silver Company v. Lee .....                     | 2 O. R. 451 .....                 | 677          |
| Merrick v. Sherwood.....                                | 22 C. P. 467 .....                | 363          |
| Metcalf v. Keefer .....                                 | 8 Gr. 392 .....                   | 403          |
| Metropolitan R. W. Co. v. Jackson ....                  | L. R. 3 App. Cas. 197.....        | 250          |
| Milloy v. Kerr.....                                     | 3 A. R. 350 .....                 | 29           |
| Mills Ex parte.....                                     | 2 Ves. Jr. 295 .....              | 311          |
| Millet v. Wood .....                                    | 24 La. Ann. 198 .....             | 353          |
| Miller v. Grand Trunk R. W. Co .....                    | 25 C. P. 389 .....                | 484          |
| Minor Ex parte .....                                    | 11 Ves. 559.....                  | 559          |
| Mitchell v. Goodall .....                               | 5 A. R. 164 .....                 | 8            |
| Mollett v. Robinson .....                               | L. R. 7 C. P. 120; 7 H. L. 802 .. | 142          |
| Montreal Ins. Co. v. McGillivray .....                  | 13 Moo. P. C. 87 .....            | 265          |
| Montgomery v. Boucher .....                             | 14 C. P. 45.....                  | 465          |
| Moody, Re .....   | 9 Cox. 162.....                   | 56           |
| Moran v. Currie .....                                   | 8 C. P. 60.....                   | 713          |
| Moulton v. Edwards .....                                | 6 Jur. N. S. 305 .....            | 559          |

## Mc.

|                                 |                      |     |
|---------------------------------|----------------------|-----|
| McCabe v. Thompson.....         | 6 Gr. 175 .....      | 10  |
| McCracken, Re .....             | 4 A. R. 486 .....    | 404 |
| McCready v. Higgins et al ..... | 24 C. P. 233 .....   | 362 |
| McDonald v. Cameron .....       | 4 U. C. R. 1.....    | 251 |
| McDonald v. McDonell.....       | 2 E. & A. 393 .....  | 10  |
| McKay v. Crysler .....          | 3 S. C. 436 .....    | 660 |
| McLeod v. Hamilton .....        | 15 U. C. R. 111..... | 125 |
| McMartin v. Moore .....         | 27 C. P. 397 .....   | 4   |
| McMaster v. Garland.....        | 31 C. P. 320 .....   | 29  |
| McMillan v. McSherry .....      | 15 Gr. 133 .....     | 3   |
| McNamara v. Condon .....        | 1 McArthur 364 ..... | 353 |
| McQuarrie v. Fargo .....        | 21 C. P. 478 .....   | 553 |
| McRae v. Froom.....             | 17 Gr. 357 .....     | 498 |

## N.

|  |                      |     |
|--|----------------------|-----|
| Naughton v. Ottawa Agricultural Ins. Co. | 43 U. C. R. 121..... | 380 |
| Neil v. The Travellers' Insurance Co.... | 7 A. R. 570 .....    | 258 |
| Newcastle Ins. Co. v. Macmoran .....     | 3 Dow. 255 .....     | 386 |

| N.                                       |                         |              |
|--|-------------------------|--------------|
| NAMES OF CASES CITED.                    | WHERE REPORTED.         | Page of Vol. |
| Newman v. Springfield Fire Ins. Co. .... | 17 Minn. 123 .....      | 381          |
| Nichols v. Marsland .....                | 2 Ex. D. 4 .....        | 234          |
| Nichols v. Great Western R. W. Co. ....  | 27 U. C. R. 382.....    | 250          |
| Nicholson v. Dillabough .....            | 21 U. C. R. 591.....    | 713          |
| Nicholson v. Leavitt .....               | 3 Selden 510.....       | 410          |
| Norton v. Eastern R. W. Co. ....         | 113 Mass. 366 .....     | 484          |
| Nunes v. Carter .....                    | L. R. 1 P. C. 348 ..... | 611          |

## O

|   |                         |     |
|---|-------------------------|-----|
| O'Doherty v. Ontario Bank .....                   | 32 C. P. 85.....        | 608 |
| Ogden v. Montreal Assurance Co. ....              | 3 C. P. 576 .....       | 649 |
| Ogilvie v. Foljambe .....                         | 3 Mer. 52 .....         | 166 |
| Oldhams v. Jones .....                            | 5 B. Munroe 458.....    | 660 |
| O'Mahoney v. Burdett .....                        | L. R. 7 H. L. 388 ..... | 476 |
| Ontario Bank v. Clarke.....                       | 18 Gr. 504 .....        | 125 |
| Ormrod v. Huth .....                              | 14 M. & W. 651 .....    | 700 |
| Orr v. Beaver and Toronto Mutual Ins.<br>Co. .... | 26 C. P. 141 .....      | 615 |
| Owen v. Thomas.....                               | 3 M. & K. 353.....      | 167 |
| Owens v. Holland Purchase Ins. Co ....            | 56 N. Y. 565 ..         | 384 |

## P.

|  |                                     |     |
|--|-------------------------------------|-----|
| Page v. Adam.....                        | 4 Beav. 269 .....                   | 559 |
| Paradine v. Jane.....                    | Aleyn 26 .....                      | 234 |
| Parke v. Brown .....                     | Leach 775.....                      | 105 |
| Parr v. Jewell.....                      | 16 C. B. 706 .....                  | 351 |
| Patterson v. Robb .....                  | 6 P. R. 114 .....                   | 559 |
| Peers v. Carroll .....                   | 19 U. C. R. 229.....                | 125 |
| Peoria Marine and Fire Ins. Co. v. Hall. | 4 Bennet Fire Ins. Cases 738 ....   | 393 |
| Perth, Re.....                           | 39 U. C. R. 34 .....                | 173 |
| Peruvian Guano Co. v. Bockwoldt .....    | W. R. 1883, p. 26 (23 Ch. D. 225).. | 436 |
| Pike v. Fitzgibbon.....                  | 17 Ch. D. 454 .....                 | 362 |
| Pim v. Ontario .....                     | 6 C. P. 304 .....                   | 529 |
| Pimington v. Garland.....                | 9 Ex. 1.....                        | 711 |
| Polack v. Everett .....                  | 1 Q. B. D. 669.....                 | 362 |
| Pollock v. Eastern R. W. Co .....        | 124 Mass. 158 .....                 | 484 |
| Potter v. Duffield .....                 | 18 Eq. 4 .....                      | 164 |
| Prescott v. Eastern R. W. Co .....       | 113 Mass. 370 .....                 | 484 |

## R.

|  |                        |     |
|--|------------------------|-----|
| Rae v. Geddes.....                       | 3 Ch. Cham. 404.....   | 559 |
| Rainey v. Moody .....                    | 6 C. P. 471 .....      | 125 |
| Rangeley v. The Midland R. W. Co ....    | L. R. 3 Ch. 306 .....  | 707 |
| Rastrick v. Great Western R. W. Co ..    | 27 U. C. R. 396... ..  | 250 |
| Redford v. Mutual Ins. Co. of Clinton .. | 38 U. C. R. 538.....   | 384 |
| Reesor v. The Provincial Ins. Co .....   | 33 U. C. R. 357.....   | 649 |
| Regina v. Brown.....                     | 6 A. R. 386 .....      | 87  |
| Regina v. Millis .....                   | 10 Cl. & F. 534.....   | 137 |
| Regina v. Moody.....                     | L. & C. 173 .....      | 33  |
| Regina v. Morton .....                   | 19 C. P. 31.....       | 100 |
| Regina v. Nash .....                     | 2 Den. C. C. 493 ..... | 108 |
| Regina v. Northowram.....                | 9 Q. B. 24.....        | 268 |
| Regina v. Port Perry.....                | 38 U. C. R. 445.....   | 720 |
| Regina v. Ravenstonedale.....            | 12 A. & E. 73.....     | 268 |



R.

| NAMES OF CASES CITED.                   | WHERE REPORTED.                         | Page of Vol. |
|---|---|--------------|
| Regina v. Ritson.....                   | L. R. C. C. R. 200, 11 Cox, C. C. 352.. | 32, 94       |
| Regina v. Smith .....                   | L. & C. 178 .....                       | 33           |
| Regina v. Weil .....                    | 9 Q. B. D. 701.....                     | 150          |
| Regina v. White.....                    | 2 C. & K. 404 .....                     | 80           |
| Regina v. Wilkinson .....               | 42 U. C. R. 505.....                    | 720          |
| Reid v. Reid .....                      | 25 Beav. 469 .....                      | 187          |
| Rex v. Edgmond.....                     | 3 B. & Al. 107 .....                    | 268          |
| Rex v. Pease .....                      | 4 B. & C. 30.....                       | 578          |
| Reynell v. Lewis.....                   | 15 M. & W. 527 .....                    | 125          |
| Richardson v. Gray .....                | 29 U. C. R. 360.....                    | 4            |
| Ridgway v. Wharton .....                | 3 D. M. & G. 677 .....                  | 165          |
| Ridler v. Ridler .....                  | 22 Ch. D. 74 .....                      | 470          |
| Risk's Appeal .....                     | 52 Penn. 270 .....                      | 533          |
| Roach v. Trood .....                    | 3 Ch. D. 429.....                       | 197          |
| Robertson v. Skelton.....               | 12 Beav. 260 .....                      | 556          |
| Robinson v. Davison .....               | L. R. 5 C. P. 577.....                  | 235          |
| Rodger v. Comptior D'Escompte de Paris  | L. R. 3 P. C. App. 465.....             | 397          |
| Rogers v. DeForest.....                 | 7 Paige 272 .....                       | 410          |
| Rogers v. Kennay .....                  | 9 Q. B. 592 .....                       | 4            |
| Rokebach v. Germania Fire Ins. Co ..... | 62 N. Y. 47 .....                       | 384          |
| Ross v. Grange .....                    | 25 U. C. R. 396.....                    | 234          |
| Ross v. McLay .....                     | 26 C. P. 190 .....                      | 321          |
| Ross v. Steele .....                    | 1 Ch. Cham. 94 .....                    | 559          |
| Rowles v. Senior.....                   | 8 Q. B. 677 .....                       | 601          |
| Rowley v. Empire Ins. Co .....          | 36 N. Y. 550 .....                      | 380          |
| Rowley v. Rowley .....                  | Kay 242.....                            | 187          |
| Royal Canadian Bank v. Carruthers ..... | 26 U. C. R. 289.....                    | 4            |
| Russell v. The Queen.....               | L. R. 7 App. Cas- 836 .....             | 639          |
| Ryder v. Wombwell .....                 | L. R. 4 Ex. 52.....                     | 263          |

S.

|   |   |     |
|---|---|-----|
| Sale v. Lambert .....                                     | 18 Eq. 1 .....                                      | 163 |
| Sanders v. Malsburg .....                                 | 1 O. R. 178 .....                                   | 608 |
| Sargent v. Metcalfe .....                                 | 5 Gray 306 .....                                    | 128 |
| Saunders, Re .....  | 59 L. T. 133 .....                                  | 32  |
| Sauvey v. Isolated Risk and Farmers'<br>Fire Ins. Co..... | 44 U. C. R. 523 .....                               | 381 |
| Scott v. Lord Seymour .....                               | 1 H. & C. 234 .....                                 | 437 |
| Shannon v. Hastings Mutual Fire Ins. Co                   | 26 C. P. 380 ; 2 A. R. 81 ; 2 S. C.<br>R. 394 ..... | 381 |
| Shepherd v. Walker.....                                   | L. R. 20 Eq. 659.....                               | 466 |
| Shields v. Blackburn.....                                 | 1 Hy. Bl. 158 .....                                 | 701 |
| Shields v. Grand Trunk R. W. Co.....                      | 7 C. P. 111 .....                                   | 484 |
| Shotwell v. Jefferson Ins. Co .....                       | 5 Bos. N. Y. 247.....                               | 647 |
| Shove v. Pinke .....                                      | 5 T. R. 129 .....                                   | 712 |
| Sidebotham v. Barrington.....                             | 3 Beav. 524 .....                                   | 559 |
| Silverthorne v. Hunter .....                              | 2 A. R. 157 .....                                   | 699 |
| Silverthorne v. Campbell.....                             | 24 Gr. 17.....                                      | 659 |
| Skinner v. The Great Northern R. W. Co                    | L. R. 9 Ex. 298 .....                               | 570 |
| Skull v. Glenister .....                                  | 16 C. B. N. S. 81 .....                             | 707 |
| Slater v. Fiske .....                                     | 1 Ch. Cham. 1.....                                  | 559 |
| Slattery's Case.....                                      | 3 App. Cas. 1194..                                  | 261 |
| Smee v. Smee .....  | L. R. 5 P. Div. 84.....                             | 188 |
| Smith v. Chadwick.....                                    | 20 Ch. D. 27 .....                                  | 717 |
| Smith v. Cherrill .....                                   | L. R. 4 Eq. 390 .....                               | 466 |
| Smith v. Pilgrim.....                                     | 2 Ch. D. at 136.....                                | 611 |
| South of Ireland Colliery Co. v. Waddle                   | L. R. 3 C. P. 463, 529 .....                        | 275 |

| S.  |                                      |              |
|---|--------------------------------------|--------------|
| NAMES OF CASES CITED.                     | WHERE REPORTED.                      | Page of Vol. |
| South Australian Ins. Co., The v. Randell | L. R. 3 P. C. 110 .....              | 126          |
| Sowden v. Standard Ins. Co.....           | 44 U. C. R. 95 .....                 | 384          |
| Spafford v. Hubbell .....                 | Rob. Jos. D. 1517 .....              | 599          |
| Spirett v. Willows .....                  | 11 Jur. N. S. 70, 3 D. J. & S. 293.. | 458          |
| State, The v. Wilson.....                 | 15 West. Jur. 424.....               | 93           |
| State v. Young .....                      | 46 N. H. 266 .....                   | 32           |
| Steels v. Hullman .....                   | 33 U. C. R. 471.....                 | 363          |
| Stephenson v. Bain .....                  | 8 P. R. 166 .....                    | 559          |
| Stone v. Knapp .....                      | 29 C. P. 605 .....                   | 362          |
| Storey v. Veach .....                     | 22 C. P. 164 .....                   | 250          |
| Storms v. Canada Farmers' Ins. Co .....   | 22 C. P. p. 95.....                  | 615          |
| Stradling v. Morgan .....                 | Plowd 204.....                       | 495          |
| Street v. Fogul .....                     | 32 U. C. R. 119.....                 | 660          |
| Sturtevant v. Ford.....                   | 4 M. & G. 101.....                   | 351          |
| Swinfen v. Swinfen .....                  | 27 Beav. 159 .....                   | 186          |
| Symington v. Symington .....              | L. R. 2 Sc. App. 424.....            | 160          |

| T.                                  |                                 |          |
|-------------------------------------|---------------------------------|----------|
| Taylor v. Ashton .....              | 11 M. & W. 401 .....            | 700      |
| Taylor v. Caldwell.....             | 3 B. & S. 830 .....             | 237      |
| Teague's Case .....                 | 2 East P. C. 979.....           | 39       |
| Tempest, Ex parte.....              | L. R. 6 Ch. 70.....             | 611      |
| Thompson v. McDonald .....          | 17 U. C. R. 304.....            | 363      |
| Thompson v. Webster .....           | 4 Drew. 228.....                | 458      |
| Thorn v. Bigland.....               | 8 Ex. 725.....                  | 700      |
| Tilt v. Silverthorne .....          | 11 U. C. R. 619.....            | 234      |
| Tommey v. White .....               | 3 H. L. C. 68 .....             | 139      |
| Toms v. Whitby .....                | 35 U. C. R. 210 .....           | 251, 484 |
| Topham v. Duke of Portland .....    | 1 DeG. J. & S. 517, 568.....    | 187      |
| Towns v. Wentworth.....             | 11 Moo. P. C. 526.....          | 476      |
| Trimleston v. D'Alton .....         | 1 D. & Cl. 85 .....             | 186      |
| Turner v. Johnson .....             | 7 Jur. N. S. 273 .....          | 363      |
| Twigg v. Fifield .....              | 13 Ves. 517 .....               | 559      |
| Twyne's Case .....                  | 1 Sm. L. C., 8th ed. p. 1 ..... | 3        |
| Tyson v. Grand Trunk R. W. Co ..... | 20 U. C. R. 256 .....           | 484      |

| U.   |                       |     |
|--|-----------------------|-----|
| United Land Co. v. Great Eastern R. W.<br>Co ..... | L. R. 10 Ch. 586..... | 707 |

| V.                                    |                    |     |
|---------------------------------------|--------------------|-----|
| Vars v. Grand Trunk R. W. Co.....     | 23 C. P. 143 ..... | 484 |
| Vaughan v. The Taff Vale R. W. Co.... | 5 H. & N. 676..... | 583 |

| W.                                    |                      |     |
|---------------------------------------|----------------------|-----|
| Wagner v. Jefferson .....             | 37 U. C. R. 551..... | 363 |
| Wakefield v. Connecticut R. W. Co.... | 37 Verm. 389.....    | 484 |
| Walden, Re Ex parte Odell.....        | 10 Ch. D. 76 .....   | 3   |
| Waldie v. Grange .....                | 8 C. P. 431 .....    | 126 |
| Walker, Re .....                      | 6 A. R. 172 .....    | 404 |
| Walker v. Hyman .....                 | 1 A. R. 360 .....    | 125 |
| Walker v. Moore .....                 | 1 Beav. 607 .....    | 533 |
| Walker v. Rostrum .....               | 9 M. & W. 411 .....  | 4   |

# CASES CITED.

xix

## W.

| Names of Cases Cited.                              | Where Reported.                     | Page of Vol. |
|--|-------------------------------------|--------------|
| Wallbridge v. Brown.....                           | 18 U. C. R. 158.....                | 552          |
| Walton v. Township of York .....                   | 30 C. P. 217 ; 6 A. R. 181 .....    | 262          |
| Ware v. Gardner .....                              | L. R. 7 Eq. 317 .....               | 458          |
| Waring v. Waring.....                              | 6 Notes of Cases, 388, 394..        | 209          |
| Warner v. White .....                              | Sir T. Jones 95 .....               | 238          |
| Waterhouse v. Lee.....                             | 10 Gr. 176 .....                    | 186          |
| Watkins v. Rymill.....                             | 10 Q. B. D. 190.....                | 262          |
| Watson v. Severn .....                             | 6 A. R. 559 .....                   | 552          |
| Watts v. Alliance Mutual Life Ass. Co..            | 45 U. C. R. 561.....                | 265          |
| Wear Cornis v. Adamson.....                        | 1 Q. B. D. 548.....                 | 234          |
| Webster v. Brant .....                             | 18 U. C. R. 87 .....                | 324          |
| Welsh v. Niagara District Mut. Ins. Co.            | 27 C. P. 134 .....                  | 617          |
| Wilford v. Berkeley .....                          | 1 Burr. 609 .....                   | 251          |
| Williams v. Goude.....                             | 1 Hagg 577 .....                    | 186          |
| Williams v. Lloyd .....                            | W. Jones 179 .....                  | 238          |
| Wilson v. Rousseau .....                           | 4 Howard 646 .....                  | 507          |
| Wilson v. Standard Fire Ins. Co. ....              | 29 C. P. 308 .....                  | 380          |
| Wilson v. Tumman .....                             | 6 M. & G. 236.....                  | 601          |
| Wilson v. Wilson .....                             | 5 H. L. C. 49 ; 22 Gr. 39 ....      | 139 188      |
| Windsor, Re .....                                  | 6 B. & S. 522, 10 Cox. C.C. 118 32, | 88           |
| Winford v. Wollaston .....                         | 2 Lev. 266 .....                    | 711          |
| Wingate v. Enniskillen Oil Co.....                 | 14 C. P. 379 .....                  | 265          |
| White v. Wilson.....                               | 13 Ves. 87 .....                    | 208          |
| Woodworth v. Sherman .....                         | 3 Story 171 .....                   | 498          |
| Wooley v. North London R. W. Co ....               | L. R. 4 C. P. 602.....              | 578          |
| Wooley v. Pole .....                               | 14 C. B. N. S. 538 .....            | 578          |
| Worseley v. Demattos .....                         | 1 Burr. 474 .....                   | 457          |
| Worswick v. Canada Fire and Marine<br>Ins. Co..... | 3 A. R. 487 .....                   | 381          |
| Wright v. London Life Ass. Co .....                | 5 A. R. 225 .....                   | 275          |
| Wyatt v. The Great Western R. W. Co.               | 6 B. & S. 709 .....                 | 263          |

## Y.

|                        |                             |     |
|------------------------|-----------------------------|-----|
| Yokham v. Hall .....   | 15 Gr. 335 .....            | 660 |
| Young v. Lambert ..... | L. R. 3 P. C. App. 142..... | 8   |



# ONTARIO

## APPEAL REPORTS.

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McMASTER ET AL. v. GARLAND ET AL.

*Equitable assignment of proceeds of goods—Chattel Mortgage Act—Change of possession.*

B., a dry goods dealer at Ottawa, consigned his stock in trade to S. S. & Co., auctioneers in Toronto, for sale, the proceeds to be applied (1st) in payment of \$800 advanced to B. by S. S. & Co., and (2nd) in payment of \$250 advanced by McM. & Co. After the goods had reached the warehouse of S. S. & Co., B. gave other orders on the proceeds, which they accepted conditionally. After the sale had been advertised, but before the time appointed for selling, the sheriff levied on the goods under an execution sued out by the defendants who, on ascertaining the nature and amount of S. S. & Co.'s claim, paid the same to them, and the sale by arrangement was allowed to proceed, the amount realized therefrom being paid into the hands of the sheriff, who should hold the same until the rights of all parties were ascertained. The sheriff thereupon caused the several claimants to interplead.

*Held*, affirming the judgment of the Court below, 31 C. P. 320, [ARMOUR, J., dissenting,] that the several orders on S. S. & Co. operated as equitable assignments of the goods or their proceeds; that the consignment to S. S. & Co., was as complete and continuous a change of possession as under the circumstances it was possible to effect, and therefore no necessity existed under the Chattel Mortgage Act for registering the orders, if that could be done; and that the defendants having by their payment to S. S. & Co. been subrogated to their rights, were entitled in priority to all the other claimants to rank upon the proceeds for the sum so advanced.

THIS was an appeal by the defendants, and a cross-appeal by the plaintiffs the Bank of Ottawa, from a judgment of the Court of Common Pleas, reported 31 C. P. 320, where the facts giving rise to the action, are fully and clearly stated.

By that Rule it was "ordered that a verdict be entered for the defendants for \$960.75, claim of Scott, Sutherland

& Co., and that the Rule *nisi* be discharged as to the residue." The appeal therefore was because the Rule *nisi* was discharged except as to the \$960.75; the cross-appeal on the ground that, as the bank insisted, the defendants were not entitled to be paid any sum out of the proceeds of the sheriff's sale until the full amount of the claims of the plaintiffs McMaster, McClung & Co. and the bank, were satisfied.

The appeals came on to be argued on the eighth and ninth days of February, 1882.\*

*McCarthy*, Q. C., and *Clement*, for the appellants, N. & T. Garland, contended that the property in the goods had not passed from Brannan at the time of the seizure by the sheriff. The possession, it is true, was held by Scott & Co., but they did so as agents of Brannan, not of the respondents, or either of them; that Scott & Co. never recognized the respondents, or either of them, as the owner of the goods, but treated Brannan as such, and were willing to hand them over to the sheriff when their claim was satisfied, thus evidencing that they regarded the goods as Brannan's; that the respondents, McMaster & Co., based their claim to the goods upon an order of the 28th of May, 1880, made by Brannan upon Scott & Co., and the letter of 31st May, from Scott & Co. to them, but this order refers to the proceeds of the sale of the goods and not to the property in the goods themselves, so that the goods having been taken by the sheriff from Scott & Co., before they were sold, this order never took effect; the proceeds never having come to the hands of Scott & Co.

So far as respects the claim of the Bank of Ottawa to the goods upon the order of 31st May, 1880, by Brannan on Scott & Co., for \$1,461.47, and the letter of the same date from Scott & Co., asking the Bank to allow the goods to be advertised as sold by the order of the bank, it is

*Present*: SPRAGGE, C. J. O., BURTON, PATTERSON, JJ.A., and ARMOUR, J.

submitted that this could not pass the property in the goods or the proceeds to the bank ; and even if the several orders and acceptances did operate as equitable assignments of the goods to the respondents respectively, it was still necessary, as against the appellants, that the provisions of the Act, R. S. O. ch. 119, should be complied with, which had not been done. *Re Walden, Ex parte Odell*, 10 Ch. D. 76 ; *Ex parte Canning*, in *Re Steele*, L. R. 16 Eq. 414 ; *Edwards v. Edwards*, 2 Ch. D., 291 ; *Ancona v. Rogers*, 1 Ex. D. 285 ; *Ex parte Mackay*, L. R. 8 Ch. 643 ; *McMillan v. McSherry*, 15 Gr. 133 ; *Re Bamfield, Ex parte Newport Credit Co.*, 20 W. R. 925 ; *Re Baum, Ex parte Cooper*, 10 Ch. D. 313 ; *Twyne's Case*, 1 Sm. L. C. 8th ed., p. 1, and cases therein cited, were referred to.

*J. K. Kerr*, Q. C., for the respondents, McMaster & Co. The order given by Brannan in favour of these respondents, and accepted by Scott & Co., was a good equitable assignment of the goods to the extent of the amount mentioned therein ; and for that amount they are entitled to judgment. At the time of the sale of the goods in question, the possession thereof by Scott & Co. was the possession of these respondents as against the appellants and all the world. Scott & Co. recognized these respondents as entitled to an interest in the goods, holding them for the respondents to the extent of their interest under the order and acceptance in their favour. The possession of these goods had been changed under the circumstances of the case, and therefore R. S. O. ch. 119, does not apply ; the goods in question were neither sold to the respondents, nor were they mortgaged to them, and therefore the transaction does not come within the scope of the Act ; and the order and acceptance are not within the Act, and therefore registration was not necessary. And under any circumstances, upon payment or discharge of the lien of Scott & Co., the respondents were entitled to be paid the full amount of the order and acceptance in their favour, and the same became and was a first charge upon the proceeds of the



sale of the goods: *Walker v. Rostrum*, 9 M. & W. 411; *Griffin v. Weatherly*, L. R. 3 Q. B. 753; *Duncan v. Cashin*, L. R. 10 C. P. 554; *Farquhar v. Toronto*, 12 Gr. 186; *Richardson v. Gray*, 29 U. C. R. 360; *Gildersleeve v. Ault*, 16 U. C. R. 401; *McMartin v. Moore*, 27 C. P. 397.

*Allan Cassels*, for the Bank of Ottawa, urged similar points in answer to the appellants' contention as were taken on behalf of McMaster & Co.; and as to the cross-appeal of the Bank, contended that the judgment of the Court of Common Pleas was erroneous, and ought to be reversed, and an order made by this Court setting aside that part of the verdict entered for the defendants, allowing the defendants the amount of the lien of Scott & Co., or the \$960.75, paid by the defendants to obtain possession. The appellants were not, under the circumstances appearing in this case, entitled to recover the \$960.75, for which judgment had been given in their favour; the lien for that sum having been severed from the property by the payment to the holders of the lien of Scott & Co.; and the payment and advance by the appellants of the sum to pay off that lien did not entitle them to stand, with respect to such money or lien, in the same position as Scott & Co., or to hold the same or similar rights as against the bank. He referred to *Gurney et al. v. James*, 19 U. C. R. 156; *Legg v. Evans*, 6 M. & W. 367; *Rogers v. Kennay*, 9 Q. B. 592; *Jacobs v. Latour*, 6 Bing. 130; *Clementson v. Grand Trunk R. W. Co.*, 42 U. C. R. 253; *Maulson et al. v. The Commercial Bank*, 17 U. C. R. 30; *Grant v. Wilson*, 17 U. C. R. 144; *Royal C. Bank v. Carruthers*, 26 U. C. R. 289; *Cross on Liens*, p. 48.

February 6th, 1883—SPRAGGE, C. J. O.—The facts of the case are very fully stated in the statement of the case, and in the judgment in the Court below, reported in 31 C. P. 320.

It may admit of considerable doubt whether this transaction was of a character within the Chattel Mortgage Act; but I will, for the present at least, assume it to be so.

Independently of the Act, the reasoning upon which *Beavan v. Lord Oxford*, 6 D. M. & G. 507, was decided applies. The execution creditors could have no higher right against the goods of the debtor than the right which the debtor himself had in the goods, and the law, of course, continues the same as to all cases outside of the provisions of the Act.

Assuming the Act to apply to transactions of the character in question, the principal point in this case is, whether there was a delivery of possession by Brannan, the debtor, (afterwards the execution debtor at the suit of Garland & Co.), and an actual and continued change of possession. If there was, there was a state of circumstances to which the Act does not apply, and the rule of *Beavan v. Lord Oxford*, and the other cases of that class, a very plain and sensible rule, does apply.

In getting at the meaning of the words of the Act, and saying what is a delivery and an immediate delivery of the goods which are the subject of mortgage or of sale as the case may be, we are to look at the nature of the goods and their locality, and the place at which the mortgagee or purchaser is to receive them, and of what kind of delivery they are capable. I do not see that any serious difficulty arises upon these points in this case. The goods certainly left the possession of the mortgagor by the Act of the mortgagor himself; possession actual or constructive in him ceased; and so the primary object of the Act, assuming it to apply, was fulfilled. The possession was transferred in the only way that it could be transferred when, as in this case, the mortgagor has his goods in one place, and they are to be transferred to the mortgagee in another place by the ordinary modes of conveyance by public carriers; and contemporaneously with the sending of the goods the consignees, Scott, Sutherland & Co., became entitled to hold them for their advance to Brannan of the sum of \$800. There was in that way a delivery, and as immediate a delivery of the goods by Brannan to Scott, Sutherland & Co. as the circumstances admitted of.

The purpose of the delivery was that Scott, Sutherland & Co. should sell the goods, and, in the first place, pay themselves out of the proceeds. If the transaction had stopped there Scott, Sutherland & Co. would have been mortgagees within the meaning of the Act or they would not. If not, the transaction was one to which the Act does not apply, and the claim of the execution creditors fails. If they were mortgagees, there was a delivery and change of possession within the Act.

The further transactions were, that orders were given by Brannan upon Scott, Sutherland & Co., in favour of creditors, McMaster, McClung & Co., and the Bank of Ottawa. These orders operated as equitable assignments in favour of the creditors, but it is said they were equitable assignments, not of the goods, but of the proceeds of the sale of the goods, and the defendants' execution intervened before it took place.

It is not to be doubted that an assignment of funds not yet come into the hands of the person upon whom the order is given is good, and if after due notice of such order he pays it to one not having prior title he is answerable. In *Burn v. Carvalho*, 4 M. & C. 690, Lord Cottenham instances the cases of future freight, and of non-existing but expected funds as within the rule. And rent accruing due and expected legacies are other instances.

*Burn v. Carvalho* was a case between an equitable assignee constituted so by an order upon a person who had in his hands goods of the consignor for sale in a foreign port, and the assignee in bankruptcy of the consignor; and upon the question of priority Lord Cottenham held that it was governed by the dates of the orders and of the bankruptcy respectively. The Chancellor held that certain letters of the 4th and 9th of April, 1829, amounted to an equitable assignment, and asked how a bankruptcy in June upon an Act of bankruptcy in May could destroy the effect of such equitable assignment. It is true that in the case cited, the order given was for the delivery of the goods, not of the proceeds of the sale of goods, but I do not see

how that can, in principle, make any difference. The order of 28th May, 1880, *eo instanti*, upon its being given, gave to the assignee an interest in the goods, and upon its being communicated to Scott, Sutherland & Co., they held the goods, by force of the order with a further charge upon them. This is apparent from the consideration that they could not deal with the goods otherwise than subject to the order. They did indeed in effect, and almost in terms, by their letter of the 31st May, 1880, agree so to deal with the goods to the extent of the moneys to be realized from their sale, after satisfying prior charges. Unquestionably then, as I think, their position from that moment was that of chargees upon the goods themselves, though the fruit of their charge could only be obtained by sale of the goods. Prior to the order of the 28th of May Brannan was owner of the goods subject only to the charges stated in the letter of the consignees. After the order, his interest was diminished by the amount of the order in favour of the plaintiffs. If precedence is given to the defendants' execution it will be a displacing of the charge of the plaintiffs then existing upon the goods of Brannan, and a revesting in Brannan of an interest in the goods which he had parted with in favor of the plaintiffs. I do not see how an execution against goods can possibly have such an effect. It is entirely at variance with the doctrine of *Beavan v. Lord Oxford*.

It does not appear to me to touch the question, whether the Chattel Mortgage Act applies to cases where the subject of mortgage or sale is of a nature that is incapable of actual delivery. In *Hamilton v. Harrison*, 46 U. C. R. 127, which was a mortgage of growing crops, there was a difference of opinion. In the older case of *Harris v. Commercial Bank*, 16 U. C. R. 437, the Court was not entirely of accord. *May v. Security Loan & Savings Co.*, 45 U. C. R. 106; *Gurney v. James*, 19 U. C. R. 156; *Burton v. Bellhouse*, 20 U. C. R. 60; *Gillersleeve v. Ault*, 16 U. C. R. 401. *McMartin v. Moore*, 27 C. P. 396, may also be referred to upon the same point. There is also the important case of

*Young v. Lambert*, in the Privy Council, L. R. 3 P. C. App. 142, which goes, however, upon constructive possession, and is not under the Chattel Mortgage Act. *Mitchell v. Goodall* in this Court, 5 A. R. 164, establishes that an order upon a third party against an expected fund is a good equitable assignment; and *Bennett v. Cooper*, 9 Bea. 252, and *Lett v. Morris*, 4 Sim. 607, are cases upon the same point.

I am not sure that it was made a point that there was no actual delivery to and possession in these plaintiffs. If such an objection were tenable, it would interfere with a very ordinary course of dealing among men. It is not necessary to say how it might be if Scott, Sutherland & Co. had been only agents of Brannan for the sale of his goods, and having no charge or lien upon them.

*Gurnell v. Gardner*, 9 Jur. N. S., 1220, is not unlike this case in its circumstances. An owner of some wool, which was held in the hands of a third person to whom he was indebted, gave a verbal authority to the plaintiff, to whom he was also indebted, to sell the wool, and after paying the holder of the wool to pay himself. This was held to be a good equitable assignment, and the opinion was expressed by the Court that it would have been so if the authority had been in writing. No execution had been actually issued in the case, but the defendants had obtained judgment and threatened to issue execution, and the question was, between their right and the right of the equitable assignee, and it was decided in favour of the latter. The case does not shew whether any question was raised under the Bills of Sale Act.

I do not myself think that there is room for reasonable doubt that, assuming this case to be one in which delivery and change of possession were essential to the validity of the transfer as against creditors, there was a delivery and change of possession to satisfy the Act, in favour of the plaintiffs as well as Scott, Sutherland & Co. There was certainly as much of delivery and possession as the nature of the dealing admitted of. I agree with Mr. Justice

Arrnour as to the object and intent of the Act being what he stated them to be in *Hamilton v. Harrison*, viz: that they were for the benefit and protection of creditors, and to prevent their being defrauded by persons remaining in the actual possession of goods and chattels, and keeping up the appearance of being the owners of them after having disposed of them by bill of sale either absolutely or by way of mortgage. There is no contravention of the policy of the law in holding that dealings such as that between Brannan and the plaintiffs are not within the mischief which the Act was intended to prevent, inasmuch as there is not in such cases any actual remaining in possession by the seller or mortgagor; and there is further a compliance with the terms of the Act. There are in such cases, and there has been in this, a delivery of the goods; and there has been also an actual and continued change of possession. The mischief to be met by this latter provision was that of a merely 'colourable and collusive change of possession. In this case, and in others like it, there is nothing of that kind; and where the assignees are creditors there is little if any danger of it.

Upon the whole my opinion is, that as between the plaintiffs and defendants upon this interpleader issue the plaintiffs are entitled.

A question, however, is raised by the Bank of Ottawa, as between the bank and the defendants, as to the sum of \$960.75 paid by the defendants to Scott, Sutherland & Co., to relieve the goods seized in execution from their lien to that amount, the judgment of the Court below being that as to that sum the defendants are entitled to stand in the place of Scott, Sutherland & Co. My brother Burton has dealt with that point in the judgment prepared by him: and, concurring in the reasons which he gives for the conclusion at which he arrives, the judgment of the Court below is, in my opinion, correct upon that point also.

As to costs. As between Garland & Co., and McMaster & Co., it is of course that the appeal should be dismissed with costs. As between Garland & Co. and the Bank of

Ottawa, the fund realized being insufficient to satisfy the charges which stood in priority to that of the Bank of Ottawa, the only interest which the bank had in the appeal was to displace the position given to Garland & Co. by the judgment of the Court below, viz: to stand in the place of Scott, Sutherland & Co. as to the sum paid by the defendants to that firm. In that the bank fails, and should pay to Garland & Co. any costs that they may have incurred in resisting that claim.

BURTON, J. A.—A good deal of the argument addressed to us appears to me to have been based on a misapprehension of the rights of the sheriff under the writ of *fi. fa.*

I gather from the evidence that the goods in question were consigned to Messrs. Scott, Sutherland & Co. by a bill of lading with a draft for their acceptance attached; and that upon acceptance of that draft and payment of freight and charges the goods were delivered over to them. The consignees would therefore appear to have acquired not a mere right to the possession of the goods, but the absolute legal property in them in security for their advance, and whatever may be the rights of an execution creditor under sec. 27 of R. S. O., c. 66, the sheriff apart from that statute would have had no power to seize or sell the goods in question.

It may perhaps be open to some question whether the interest of Brannan in them was saleable under a legal writ—if the reasoning which induced the Court to decide that the statute authorizing the sale of an equity redemption in lands did not apply to any case where the equity or right to redeem did not appear upon the face of the mortgage itself, is to be held applicable to an equity of redemption in chattels. See *McCabe v. Thompson*, 6 Gr. 175; *McDonald v. McDonnell*, 2 E. & A. 393.

But assuming that the execution would attach, all that the sheriff could sell would be the equity of redemption, and the purchaser would be entitled to redeem.

The mortgagee would not be bound to accept payment

of his charge except upon the terms of the loan, and until his claim was discharged the sheriff could not apart from the statute seize, and even since the statute would not be entitled to interfere with his possession.

If then the sheriff had sold the interest of the debtor in these goods, what would have been the right of the purchaser?

Before the seizure by the sheriff the consignees had accepted the order in favour of Messrs. McMaster, McClung & Co., and had notice of the order in favor of the Ottawa Bank. The case of *Frith v. Forbes*, 4 DeG. F. & J. 409, shews that under these circumstances if a consignee choose to accept a consignment with express directions to apply it or the proceeds of it in a particular mode he cannot set up his general lien in opposition to those directions : that in such a case only what remains after answering the particular directions can become subject to the general lien.

What then was the position of parties at that time ? It appears to me to be clear that as far as Brannan and Scott, Sutherland & Co. are concerned there was an appropriation of the goods consigned (subject to Scott, Sutherland & Co.'s prior charge) to the payment of the orders in favor of McMaster, McClung & Co. and the Ottawa Bank, and that they might have filed a bill to have it declared that they were so entitled, if any person claiming subsequently under Brannan by transfer had set up a title, unless the provisions of the Chattel Mortgage Act requiring registration apply. Is a person claiming not as a purchaser but as a judgment creditor in any better position than the debtor himself ?

It will scarcely be contended this transfer to Scott, Sutherland & Co. was one requiring registration ; it was accompanied by an immediate delivery, and the possession completely changed, and they acquired a perfectly legal title to the extent of their claim at least.

It seems to me to be also clear that the equitable assignments effected by the orders in favour of McMaster, McClung & Co. and the Ottawa Bank are not within the



spirit or the language of the Bills of Sale Act, the object of which was to prevent secret transfers of property being made by the party in possession without notice by registration to creditors or purchasers that the party so in possession ceased to be owner.

I am of opinion, therefore, that the claims of these assignees are entitled to priority over the execution.

The claim of Messrs. Garland in respect of the sum advanced to Messrs. Scott, Sutherland & Co. to relieve the property from their lien remains to be considered.

It is contended on the part of the Bank of Ottawa, who were not parties to the arrangement with the sheriff, that the payment did not entitle the Messrs. Garland to stand in the position previously held by Scott, Sutherland & Co. or to hold the same or similar rights as against them.

How would the case have stood if these equitable transfers had not intervened; if the sheriff on going to make the seizure had been met simply by the lien of Messrs. Scott, Sutherland & Co?

It is quite possible that the execution creditors could not have insisted on paying off that lien, but assuming that the holders of the lien consented to receive it so as to enable the execution creditors to realize, would Brannan have been heard to complain that the sheriff had not confined the sale to an amount of goods sufficient to satisfy the sum indorsed on the execution, but had in addition sold enough to discharge the lien, without payment of which he was unable to sell the goods at all? It seems to me that there can be but one answer. He placed the goods in the consignee's hands for that purpose. Is it material, so far as he is concerned, whether the consignee sells sufficient to pay off the lien and then hands the residue of the goods to the sheriff, or receives payment from the sheriff and allows him to sell.

It would tend to bring legal proceedings into contempt if it could be successfully contended that such a payment went to relieve the debtor instead of being in effect a forced purchase of the claim to enable the execution creditor to enforce his writ.

If that would have been the position of the execution debtor, can the holder of an equitable claim to a portion of the goods which are the subject of the seizure be in a better position? All that the Bank of Ottawa took under the order in their favour was, the right to recover what was left after payment of the prior charges, including the lien which the execution creditor has discharged. If the debtor would be estopped, as I think he would be, from treating this debt as extinguished by the payment by the execution creditor, his assignee is equally estopped from doing so; and I think this must be so whether the sheriff had a right at law to sell the equity of redemption or not, as by lodging the writ the execution creditor would have a right to enforce his lien in equity.

For these reasons I think the judgment appealed from is correct, and that the appeal and cross appeal should be dismissed, with costs.

PATTERSON, J. A.—I am also of opinion that we must dismiss the appeal for the reasons given by the Chief Justice and Mr. Justice Osler in the Court below, and in the judgments which now have been delivered by the Chief Justice and my brother Burton which have exhausted the subject.

When the defendants' *fi. fa.* was delivered to the Sheriff on the 9th June, 1880, Brannan, the execution debtor, had no beneficial interest in the goods. The whole value was absorbed by the lien of Scott, Sutherland & Co., and the charges created by the orders given in favour of the plaintiffs and the Bank of Ottawa. The goods having been sent to the auctioneers to be sold, a disposition of them to which the plaintiffs and the bank assented, there could be no difference in effect between an order to pay a debt out of the proceeds of the goods and an order to hold the goods themselves for the creditor to the extent of his debt, nor does it matter whether the bailee be called agent for the creditor, or trustee for the creditor. He was to act for the creditor in realizing his debt from the goods, and from the time of receiving the orders, he represented the creditors.

But not only had Brannan no beneficial interest in the goods, he had not, in my opinion, any legal interest. The delivery of the goods to Scott, Sutherland & Co. to hold for their own benefit as far as their lien was concerned, and for the benefit of the creditors in whose favour the orders were given, I take to have passed the legal property to Scott, Sutherland & Co. The circumstance that some of the orders were not given till after they had possession of the goods, so long as they were given before the Sheriff received the writ, would not alter the effect.

The question to be considered, and if I am not mistaken, the only ground on which, at the trial, it was sought to avoid the consequence of the delivery to Scott, Sutherland & Co. is the application of the Act respecting chattel mortgages. I cannot on this subject usefully add anything to what was said by the learned Chief Justice of the Common Pleas in his very carefully considered judgment. There clearly was an immediate delivery, and an actual and continued change of possession. The sheriff did not find the goods in the possession, either actual or apparent, of Brannan, or in the possession of any agent or trustee of Brannan, unless so far as it might have been surmised that possibly some value might remain over and above the interest of the creditors. The event shewed that any such surmise would have been mistaken.

ARMOUR, J., dissented.

*Appeal dismissed, with costs.*

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## SMITH V. THE MERCHANTS' BANK.

*Warehousemen—Warehouse receipts—Trade and commerce—Banking—  
Dominion Legislature—Ultra vires.*

*Held*, on appeal, (reversing the decree of the Court of Chancery, 28 Gr. 629,) that to bring a transaction within section 46 of the Dominion Banking Act of 1871 (34 Vict. ch. 5), there must be three persons concerned therein; the owner of the goods, some person filling the position of the keeper of a wharf, &c., and the bank (or more accurately speaking, at least two persons, one of whom may act in the dual character of owner of the goods and keeper of a wharf, &c., and the bank), and it is from the holder of the warehouse receipt therein referred to, that the bank is allowed to acquire the document in security, on certain conditions, for advances.

*Per* ARMOUR, J.—The provisions of 34 Vict. ch. 5, sect. 46, are beyond the powers of the Dominion Legislature, as not falling within the denominations, "The regulation of trade and commerce," or "Banking, incorporation of banks, and the issue of paper money," in the 91st sect. of the B. N. A. Act referred to, but falling wholly within the denomination; "Property and civil rights in the Province," in the 92nd sect., and being therefore within the exclusive powers of the Provincial Legislature.

The warehouse receipts in this case, signed by W. S., one of the owners of the goods, acknowledged the receipt of the goods *from the bank*, and it was held that they were not within the Act, and therefore the bank could not claim under them.

*Quære*, whether, from the evidence set out below, W. S. was a warehouseman within the meaning of the Act; and as to the effect of the mixture of the coal in question with other coal.

THIS was an appeal by the plaintiff from the decree of the Court of Chancery pronounced by Spragge, C., (28 Gr. 629), where the circumstances out of which the suit arose are stated.

On the examination of witnesses in the Court below, Mr. Cooke, manager of the defendants' agency at Toronto, was examined on behalf of the defendants, and in the course of his examination gave the following evidence: \* \*

"Q. When the cargoes came what did you do? A. I discounted a note of \$7,000 and took collateral security; I took a memorandum; he could not give me a warehouse receipt as the coal was at the wharf and was not unloaded. Q. Well, you took a memorandum from him at all events? A. Promising to give me warehouse receipts. Q. On what, as soon as he could, or what? A. Just as soon as he could get it unloaded, and upon the promise of that I discounted his note of \$7,000. Q. Was the coal sent to you, or how was it? A. I think this probably was sent to us. Q. Do you remember the names of the three schooners? A. Yes, the schooners *Drummond*, *Gold Hunter*, *Dundee*, and shortly afterwards

the *Annie Mulvey*—these were the four included in the first warehouse receipt. Q. When you say you discounted the notes you placed the proceeds to his credit? A. I opened an account and placed the proceeds, amounting to \$6,820.49, to his credit; it was understood that this was a special account for the purpose of paying for this coal, and I kept trace of the amounts we loaned to him and the amounts we paid out for the coal, so as to see that the money went for the purpose intended. \* \* \*

Q. Here is the bill made out to Snarr's Sons; where is the memorandum from him agreeing to give warehouse receipts; have you that? (Memorandum dated Toronto, 2nd August, 1878, was here read.) Q. And that was his memorandum agreeing to give you warehouse receipts? A. Yes.

Q. And here would be the bill of lading by the *Drummond*? A. Yes.

Q. That bill of lading you gave up to him in order to enable him to get the coal? A. I gave him an order; I gave him a separate order to the captain of the vessel to deliver the coal to him; I think that was done in nearly every case. Q. This produced was the first note of \$7,000, dated 24th July, 1878? A. Yes.

Q. That would be a few days before the coal arrived; that \$7,000 note was renewed? A. Yes. Q. When? A.

I think about the 27th November, the date it fell due. Q. And this would be the renewal? A. \$4,200. Q. Do you know how the difference was paid, \$2,800? A. Paid by some coal sold to a man named Rimer.

Q. By a sale of what coal was that? A. A sale of some from a vessel that he never gave me a warehouse receipt for, a vessel named *E. P. Dorr*; he gave me some paper and some money that made it up. Q. He paid by the proceeds of certain coal, for which the bank had not got a warehouse receipt, \$2,800, leaving \$4,200, and that was still owing to the bank? A.

Yes. Q. The next transaction would be? A. He discounted a note of \$10,000 on the 10th August. Q. You did not discount all these notes at the same time? A. No; as soon as he notified the coal as being about arriving he passed the paper over.

[THE COURT—"The advances were made upon the promise to give the warehouse receipts on its arrival. You were consignees of all the coal? A. I think it was all shipped to our order; he could not touch it without our intervention.] Q. In some cases the shippers drew upon the bank? A. No; they got Snarr's Sons' cheques for everything, there were drafts drawn, but I did not honour them. Q. When you cashed, what was it you cashed? A. Notes, and I put them to the credit of the account.

Q. The understanding in the beginning was, that you would discount to the extent of \$25,000 on the security of these warehouse receipts? A. Yes.

Q. In all cases you took that undertaking to give warehouse receipts? A. Yes; if there is any case in which I did not get it, it was promised.

Q. Was the engagement to give warehouse receipts given before the arrival of it? A. Yes; the transaction was based upon that; the warehouse receipts were given as the coal arrived. Q. He would come to you and say, "A lot of coal is here or on its way? A. Yes. Q.

And he would tell you what money he wanted, and you would discount his note, and take his undertaking to give warehouse receipts as soon as the coal arrived? A. Yes. Q. And when he came and wanted the money

you would give the money? A. No, I did not give him the money till I got these different drafts; I cashed his cheques for the freight and so on, I required to know what the money was for."

The appeal came on to be heard before this Court on the 1st of February, 1882.\*

*MacLennan*, Q. C., and *Kingsford*, for the appellant.

*C. Robinson*, Q. C., and *J. F. Smith*, for the respondents.

The points relied on and cases cited, appear sufficiently in the report of the case in the Court below, and in the judgment.

February 2nd, 1883. BURTON, J. A.—The course of dealing pursued in this case was shortly this:

The bank agreed to make advances to certain coal dealers, using the names of John Snarr's Sons, upon certain indorsed paper, with the understanding that warehouse receipts should be furnished to the bank; and in order to do this, the following plan was resorted to:

The Snarrs would purchase coal in the United States, and the invoice would be made out with their names as the purchasers, but it would be consigned to the order of the bank in Toronto, with a draft upon the bank for the amount, so that the Snarrs could not obtain delivery except upon the order of the bank manager. The draft was not accepted or paid by the bank, but on the arrival of the vessel the bank was advised of it, and then discounted the Snarrs' paper such as I have described, and the Snarrs would then receive from the bank the bills of lading on giving to the bank a receipt for them, containing an undertaking that they would leave their warehouse receipts covering the same coal.

Upon this an order was given by the Snarrs to the bank to charge the draft to their account.

In pursuance of this understanding, receipts were given from time to time, signed by one of the Snarrs only, of which the following is a specimen:

*Present.*—BURTON, PATTERSON, MORRISON, J. A., and ARMOUR, J.

## "WAREHOUSE RECEIPT."

"Received in store in Big Coal House warehouse at Toronto, from Merchants' Bank of Canada (at Toronto), fourteen hundred and fifty-eight (1458) tons stove coal, and two hundred and sixty-one tons chestnut coal, per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter,' and 'Annie Mulvey,' to be delivered to the order of the said Merchants' Bank to be endorsed hereon.

"This is to be regarded as a receipt under the provisions of Statute 34 Vic. ch. 5—value \$7,000.00.

"The said coal in sheds facing esplanade is separate from and will be kept separate and distinguishable from other coal.

"Dated 10th August, 1878.

"W. SNARR."

And the first question that arises is, assuming the clauses of the Banking Act which profess to deal with these receipts as collateral security to be *intra vires* of the Dominion Parliament, whether the transaction is valid within either section 46 or 48, aided as they are by the addition of section 47 of that Act, the Banking Act of 1871.

It appears to me that notwithstanding the changes adverted to by the learned Chief Justice in the phraseology of section 46, since the decision in the *Royal Canadian Bank v. Miller*, 28 U. C. R. 593; 29 U. C. R. 266; the receipt given in this case is not a document which would have the effect of vesting the title in the bank; and that the bill of lading, looking at the nature of the transaction, and the prohibitory clauses of the Bank Charter repeated in the General Banking Act, could not have that effect.

Notwithstanding the generality of section 46 as now framed, I am of opinion that to bring the case within that section there must be three persons concerned; the owner of the goods, some person filling the position of a keeper of a wharf, yard, or other place, and the bank; or, to speak more accurately, at least two persons, one of whom may act in the dual character of owner of the goods and keeper of the wharf, &c., and the bank; and that it is with the holder of that document that the section deals, and allows the bank to acquire it from him in security on certain

conditions, whereby the property vests in the bank without any indorsement, or any further formality; but I apprehend it is as necessary now as ever that the bank should acquire it from the holder of the receipt. I think this is manifest from a review of the legislation on the subject.

The 22 Vict. (1859) ch. 20, is the first Act upon the subject. It provided that a receipt given by a warehouseman or wharfinger for goods, wares, or merchandise stored or deposited in any warehouse or other place, might by *indorsement thereon* by the owner or person entitled to receive such goods, be transferred to any bank as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, and being so indorsed should vest in the bank all the right and title of the indorser; but it limited the period during which the lien should exist to six months, and provided that no such transfer should be made unless the note was negotiated at the same time with the indorsement of the receipt. The Act in this shape is to be found in the Consolidated Statutes of Canada.

The first amendment is to be found in 1861 (24 Vict. ch. 23,) which provided, in the same terms as are now to be found in section 48, that where any person engaged in the calling of a warehouseman or wharfinger by whom a receipt might (as provided in the former Act) be given in such capacity, is at the same time the owner of or entitled to receive the goods, any such receipt, or—as it goes on more accurately to define it—any acknowledgment or certificate intended to answer the purpose of such receipt, given and indorsed by such person, should be as valid and effectual for the purposes of the Act as if the person giving such receipt, &c., and indorsing the same, were not one and the same person.

The 29 Vict. ch. 19, passed in 1865, extends the provisions of the former Acts so as to include receipts given by a cove keeper, or by the keeper of any wharf, yard, harbour,



or any place for timber, boards, deals, staves, or other lumber, stored or to be stored in any place of which he was keeper. And so matters continued up to the period of Confederation.

In 1867 the Dominion Parliament, in the Banking Act passed in that year, 41 Vic. ch. 11, adopted the provisions of the Acts passed by the old Parliament of Canada in substantially the same language; whilst the Ontario Legislature, in the R. S. O. ch. 116, re-enacted the former enactments, but confined them to dealings with private persons and not with banks.

The first material difference is to be found in the Act we are now discussing, the 34 Vict. ch. 5, passed in 1871.

The 45th section of this Act first declares that the words, "goods, wares, and merchandize," shall, when used in the subsequent sections, be held to comprise, in addition to the things usually understood thereby, timber, boards, deals, staves, and other lumber, and also all agricultural produce, so as to embrace them all within the same, instead of in different sections as previously.

The 46th section is a re-enactment of the law in reference to bills of lading and warehouse receipts, with this variation—that whilst the former used the words warehouseman and wharfinger, and provided that a receipt given by such a person might by indorsement thereon by the owner or person entitled to receive the goods, be transferred as collateral security for the payment of any bill or note discounted by the bank in the regular course of its banking business, and declared the effect to be to vest in the bank all the right and title of the indorser to or in such goods, the Act under which this transaction occurred uses the words—receipt given by the keeper of any wharf, yard, or other place, or any receipt given for goods stored or deposited in any wharf, yard, harbour, warehouse, or other place in Canada, without any reference to the person by whom it is to be given; and provides that the bank *may acquire and hold* such receipt as collateral security for the due payment of any note or bill of exchange discounted by

the bank in the usual course of business, or for any debt which may become due to the bank under any credit opened or liability incurred by the bank for or on behalf of the holder of such receipt, or for any other debt to become due to the bank; and it declares, that such receipt being so acquired shall vest in the bank from the date of such acquisition all the right and title of the last previous holder.

The 47th section provides, that it will be sufficient if the bill, note or debt be negotiated at the time of the acquisition of the receipt by the bank, or upon the understanding that it will be transferred.

The 48th section is in effect the same as the previous enactments, where the warehouseman is himself at the same time the owner of the goods.

These amendments were made in consequence of the decisions in the *Bank of British North America v. Clarkson*, 9 C. P. 182, and other cases, and are certainly of a very sweeping character; they dispense with the necessity which formerly existed of an indorsement in order to vest the title, and of a contemporaneous transfer with the negotiation of the bill so long as an understanding that the transfer should be made existed, and extend it to other debts than those originally contemplated, and have carefully avoided saying by whom the receipt is to be made. But whatever may be the proper construction to put upon section 46 in that respect, it appears to me clearly to contemplate three parties to the transaction—the owner of the goods, some person to give a receipt for the goods, and the bank with whom it is to be negotiated; and it is also manifest, that the person from whom the bank is to acquire it must be the holder, and it is the right and title of the last previous holder that the bank acquires.

The case then does not come within that section, for Snarr was not the holder. It is true that he may under another section be holder as well as maker—that is to say, where he combines in his own person the calling of a warehouseman and the character of owner, he may in the

only to warehouse receipts, omitting the other instruments mentioned in them.

By section 46, the bank may acquire and hold any receipt given for cereal grains, goods, wares, or merchandize stored or deposited in any warehouse, &c., as collateral security for the due payment of any bill of exchange or note discounted by any such bank in the regular course of its banking business, or for any debt which may become due to the bank under any credit opened or liability incurred by the bank, for or on behalf of the holder or owner of such receipt, or for any other debt to become due to the bank; and such receipts, being so acquired, shall vest in the bank all the right and title of the last previous holder thereof to or in such cereal grains, goods, wares, or merchandize, subject to his right to have the same re-transferred to him if such bill, note, or debt be paid when due.

Section 47. No transfer of any such receipt shall be made under this Act to secure the payment of any bill, note or debt, unless such bill, note or debt be negotiated or contracted at the time of the acquisition thereof by the bank, or upon the understanding that such receipt would be transferred to the bank.

Section 48. When any person engaged as warehouseman, by whom a receipt may be given in such capacity as hereinbefore mentioned, for cereal grains, goods, wares or merchandise, is at the same time the owner of, or entitled himself (otherwise than in his capacity of warehouseman) to receive such cereal grains, goods, wares or merchandise, any such receipt, made by such person, shall be as valid and effectual for the purposes of this Act, as if the person making the receipt, acknowledgment or certificate, and the owner or person entitled to receive such cereal grains, goods, wares or merchandise, were not one and the same person.

Section 46 does not support the bank's claim. The receipts were acquired and held as collateral security for the due payment of a debt to become due to the bank, and they were receipts for goods stored in a warehouse. To that extent, they come within the letter of the section.

But the debt which that section speaks of is plainly a debt due or to be paid by the holder of the receipt; and the acquisition of the receipt vests in the bank no title to the goods, except the title of the last previous holder of the receipt. The receipt, therefore, under this section is not one given for goods stored by the bank, but one given to another person whose title to the goods mentioned in the receipt vests in the bank by reason of the acquisition by the bank of the receipt. In other words, for the purpose of this section, a receipt must be transferred to the bank by some previous holder of it.

Then we look at section 48. Under section 46, it is evidently contemplated that the owner of the goods to whom the receipt for them is given, is a different person from the warehouseman who gives the receipt. That section does not, it is true, expressly mention warehousemen as the persons to give receipts; but one who stores goods for another is *ipso facto* a warehouseman, at least *quoad* that transaction. Section 48 comes in to supplement the provisions of the former section by applying them to the case of the warehouseman and the owner being the same person. It does not treat the act of warehousing the particular goods by the owner on his own behalf as giving him the status of warehouseman, but gives effect only to the receipt of one whose calling is that of warehouseman. As to him it declares that his receipt or certificate, or acknowledgment intended to answer the purpose of a receipt, shall be as valid and effectual *for the purposes of the Act* as if he were not both warehouseman and owner. What are the purposes of the Act? The only purpose with which we are at present concerned is that declared in section 46, namely, that the acquisition of the document by a bank shall vest in the bank the title to the goods which was vested in the previous holder of the document. In this case there was no previous holder of the receipts. The first holder of them was the bank, and therefore no title passed to the bank by the acquisition of the receipts. The "acquisition" of a receipt or certificate made under section

48, must mean the same thing as the "acquisition" under section 46, for no effect is given to it except by reference to the earlier section; and that, as I have pointed out, is acquisition by transfer from a previous holder.

The power of the Parliament of Canada to legislate as in these sections has been questioned. I do not feel called upon to form a matured opinion upon that constitutional question, because the decision of the present contest does not in my judgment require it.

The creation of a new mode of conveying personal property certainly seems to trench upon the Provincial legislative jurisdiction over property and civil rights in the Province. By a new mode of conveyance, I mean one not known at common law. The existence before the confederation of similar legislation in some or all of the provinces which form the Dominion, does not alter the question, even though it went the length to which section 49 goes, which was the case with the statute of the province of Canada, 24 Vict. ch. 23, sec. 2, in enabling the holder of a warehouse receipt to transfer the property to a bank in fraud of rights which the section assumes an unpaid vendor might have, and which, in at least one Province of the Dominion, I believe exist, notwithstanding that he has parted with the possession.

The question is not whether the legislation clashes with any existing statute of the Province, as for example the statute which requires a chattel mortgage to be filed in a public office when the possession of the goods is not changed. It may, of course, be argued that that statute does not touch goods which are not in the owner's actual possession, but in another man's warehouse. It may even be possible to contend that no violence is done to the principle of the statute by the extension of the same exemption from its operation to all goods, even those belonging to the warehouseman himself, which are in the warehouse of one whose calling is that of warehouseman; because, as he holds himself out as custodian of the goods of other people, he is not likely to obtain credit on the

assumption that he owns the goods in his warehouse, merely because the goods are there.

The question whether the jurisdiction exists, in a case like this, to alter the law of the province, respecting the conveyance of personal property, when it comes to be considered, will have to be discussed, as indeed it has been in the argument before us, upon the proper interpretation of the B. N. A. Act, and without reference to any actual conflict between the legislation of the Dominion Parliament, and that of the Provincial Assembly. The Dominion Parliament has undoubtedly power to interfere with property and civil rights in the Provinces, as incident to several of the subjects over which it has exclusive legislative jurisdiction, amongst which are banking and regulation of trade and commerce. Whether the provisions now in question come properly within the scope of either of those subjects is the question upon which I do not at present venture an opinion; but the view of that subject which strikes me as most in favor of holding the clauses to be *intra vires* of the Parliament, and at the same time, least in conflict with our Chattel Mortgage Act, is one which aids the argument of the plaintiff upon the effect of the 48th section. The several sections we are considering may, I think, be regarded as dealing, not with the conveyance of property *per se*, but rather with documents of a commercial character which are evidences of title to property, and the validity of which does not depend upon this legislation. To these a sort of currency is given in commercial transactions, by enabling banks to take them as security collateral to the personal security given by the borrower for advances made. Thus, a receipt given by a warehouseman to his customer is evidence at common law against the warehouseman that the goods are there. On that voucher the bank is authorized to rely, and is enabled for the purpose of its security to acquire title to the goods by the transfer of the voucher. The further enactment, which is invoked in the present case, is, that if one who is already engaged in the calling of a warehouseman, and who, in that capacity can

give receipts to others, certifies that he has goods of his own stored in his warehouse, (which he requires no statutory authority for doing), that certificate shall be a document of title which he may use in the same way as a receipt for goods stored in another man's warehouse, and a bank may take it with the same effect as such a receipt.

This is the whole length to which section 48, as I read it, extends. It does not go far enough to sustain the contention of the defendants, who have no such document of title as it deals with. It is therefore evident that whether the law be *intra* or *ultra vires* they equally fail.

I may further remark that I do not think the Snarrs could have given a bank a better title under this statute by any change in the form of the transaction, as by certifying or acknowledging that they themselves held the coals as their own property, and transferring that certificate to the bank; because I could not hold, upon the facts before us, that they were warehousemen, or that William Snarr was a warehouseman within the meaning of section 48. So to hold would, I fear, be extending the Act to cases not contemplated by the Legislature. I do not doubt that if the general policy indicated by our Chattel Mortgage Act were found to be unsuited to commercial transactions which require freedom and despatch, the legislation that removed the impediments from the way of those transactions would be wise legislation. But I think that while giving to Acts like the Banking Act "such fair, large, and liberal construction and interpretation, as will best ensure the attainment of the object of the Acts according to their true intent, meaning and spirit;" we should do so in view of the general policy of the Chattel Mortgage Act, not assuming any intention on the part of the Dominion Parliament to unnecessarily disregard that policy, and we should, if possible, avoid a construction of the Dominion Act which would bring it into conflict with the law of the Province, further than a proper application of the rule laid down in the Interpretation Act may require.

I have suggested a view of these statutes by which it



may, perhaps, be possible to avoid the appearance of conflict between them. Whether or not that view successfully removes the conflict, it is founded, so far as section 48 is concerned, on what appears to me to be the true construction of that section. I do not think a person who, like the Snarrs, carries on a business such as dealing in coal, for the purpose of which business he has warehouses which he uses for storing the coal he is selling, can be said to be engaged in the calling of a warehouseman, merely because he has once or twice, or oftener allowed stone or iron to be landed at his wharf, and has charged for the use of the wharf and for allowing the goods to remain there till removed; or even because he, having horses and carts for his coal business, has hauled the goods from the wharf and delivered them on the premises of their owners. Isolated acts of the kind, although they are just such acts as would be done by one whose calling was to do such acts, do not, in my reading of the statute, bring one who is really engaged in a different calling within the description given in section 48.

A less strict reading of the section, while not required for the purpose of giving full effect to its intention and object, would be a wide and manifest departure from the policy of the Chattel Mortgage Act, because it would allow one whose possession of the goods in which he dealt—unlike the possession of a warehouseman, who would *primâ facie* be considered bailee only of the goods in his warehouse—was precisely the kind of possession most strongly indicative of absolute property, to give a secret conveyance in fraud of creditors who relied upon what they saw.

Without dwelling longer upon this subject, I may refer to the remarks made by the late Chief Justice of Ontario, and by myself in *Milloy v. Kerr*, 3 A. R. 350; and to the judgment of the Chief Justice of the Common Pleas in *McMaster v. Garland*, 31 C. P. 320, and the judgments delivered in the same case a few days ago in this Court (a).

Another question, into which I do not enter fully, is the

(a) Ante p. 1.



identity of the goods in question with those mentioned in the receipts. I allude to it merely for the purpose of saying that so far as it turns upon the right of the bank to take other coals than those specifically mentioned in the receipts, under the doctrines respecting admixture of goods, I have not formed any opinion favourable to the claim of the bank. It is clear that the principle applied to cases such as those where the known usage is to mix the grain of different customers, is excluded by the tenor of the receipts themselves; and there are strong grounds for holding that, in disposing of whatever coal was sold in the ordinary course of the business, and which may have included some or all of what was covered by the receipts, the Snarrs only did what the bank understood and intended they were to do. Besides, I do not understand that there was any admixture in the ordinary sense; but I think the fact would probably be properly found that the different cargoes of coal could always with tolerable accuracy have been distinguished from each other.

I agree that the appeal must be allowed, with the costs.

ARMOUR, J.—I agree that this appeal should be allowed, on the ground that the provisions of 34 Vict. ch. 5, under which the warehouse receipts in question were taken and granted, are beyond the powers of the Dominion Legislature, the same not fairly falling within the denominations “the regulation of Trade and Commerce,” and “Banking, Incorporation of Banks, and the issue of paper money,” in the 91st section of the British North America Act, but falling wholly within the denomination, “Property and Civil Rights in the Province,” in the 92nd section, and being therefore within the exclusive powers of the Provincial Legislature.

*Appeal allowed, with costs.*

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IN THE MATTER OF THE EXTRADITION OF  
WILLIAM A. HALL.

*Alteration of accounts—Ashburton Treaty—Embezzlement—Forgery.*

The prisoner was a clerk in the employ of the mayor and common council of the city of Newark, (in the State of New Jersey, U. S. A.), a portion of his duties being to receive payment of taxes payable to the city; and on the 18th of November, 1881, a sum of \$562.32, for taxes, &c., due upon certain lands in that city, was paid to him—such sum being included with other taxes in a check of the party assessed for \$4,094. The \$562.32 was composed of three items: costs \$7.70, interest \$72.08, and taxes \$482.54—each of which required to be entered in a separate column of the cash-book belonging to the office of the comptroller. The gross sum, (\$562.32), had apparently been entered first in the column headed "Totals," and subsequently in making the separate entries the sum of \$482.54 was entered as \$282.54, and the figure "3" in the total column substituted; the difference, (\$200), being abstracted by the prisoner from moneys paid to him on that day.

*Held*, [Per SPRAGGE, C.J.O., and GALT, J.], that this act amounted to the crime of forgery, and, as such, rendered the prisoner liable to extradition. [Per BURTON and PATTERSON, JJ.A.] that such alteration was not forgery, though the act amounted to one of embezzlement, and therefore that the prisoner was entitled to be discharged, embezzlement not being one of the offences for which a party was at the time liable to be extradited under the Ashburton Treaty.

THIS was an appeal by the prisoner William A. Hall from the judgment and order of the Chancery Divisional Court, remanding the prisoner to gaol for extradition upon warrants of commitment granted by Kenneth Mackenzie, Esq., Judge of the County Court of the County of York; and upon the order of Osler, J., made upon *habeas corpus*.

The offence charged against the prisoner was that of forgery by the fraudulent alteration of the cash book and accounts of the Comptroller of the city of Newark, State of New Jersey, whereby an entry of \$562.32 cash received by him on the 18th of March, 1881, was made to appear as \$362.32, by reason of which he had been enabled to embezzle the difference—\$200.

The facts are more fully stated in the judgments.

The appeal came to be argued on the 17th November, 1882. \*

\* *Present.* — SPRAGGE, C. J. O., BURTON, PATTERSON, JJ.A., and GALT, J.

*Bethune*, Q.C., and *N. Murphy*, for Hall. The prisoner's offence was not forgery within the treaty with the United States, for that applied only to such offences as were recognized as forgeries by the general laws of both nations: *Re Windsor*, 6 B. & S. 522, 10 Cox C. C. 118. The prisoner's act was merely to make entries in a book kept by himself shewing his own receipts, and this was not forgery: *Re Windsor* (above cited); *Lamirande's Case*, 10 Lower Can. Rep. 780, 2 Can. L. J. 283 and 4 Can. L. J. 486; *Re Saunders*, 59 L. T. 133. Nor is it forgery in England even now, but simply a misdemeanour under the "Falsification of Accounts Act, 1875," (38 & 39 Vict. cap. 24); and by sec. 3 of that Act it is to be read not as part of the Forgery Act, but as part of the Larceny Act, shewing an intention on the part of the Legislature that an act such as the prisoner is accused of is not to be treated as a forgery. The prisoner's offence may be a forgery now according to law of Canada under 32 & 33 Vict. Cap. 19, secs. 26 and 45, but it was not forgery in 1842, when the treaty was made and is not therefore within it. The decisions in the American Courts are not binding on us, but it is clear that it would not be forgery in the United States: *State v. Young*, 46 N. H. 266. To be forgery, it must be of some completed document, and here the document was not complete.

*Fenton*, for the authorities of New Jersey. The prisoner's offence is forgery by common law: *Regina v. Ritson*, L. R. C. C. R. 200, 11 Cox C. C. 352. See also definitions of forgery in Hawkins, Blackstone, Russell, Archbold, Chitty, Stephen, and other text writers. *Biles v. Commonwealth*, 8 Casey 529, and *Luberg v. Commonwealth*, in Supreme Court of Pennsylvania, May, 1880, reported in Criminal Law Magazine, vol. 1, p. 779, shew that the prisoner's offence would be held forgery in the United States under the common law. The forged entry was an accountable receipt within 7 Geo. II. ch. 26, (which is still embodied in our law, 32 & 33 Vict. ch. 19, sec. 26,) and the offence was therefore forgery at the date of the treaty. *Harrison's Case*, 1 Leach, 180; *Regina v.*

*Smith*, L. & C. 178; *Regina v. Moody*, L. & C. 173. *Windsor's Case*, and *Saunders' Case*, relied on by the prisoner's counsel, do not apply, for reasons stated in the judgment of Osler, J. The cash-book was not the prisoner's, but the official public book of the Comptroller, and the entry was not of cash received by the prisoner but by the Comptroller. Besides, the *ratio decidendi* in *Windsor's Case* was that his offence was only forgery in the State of New York, where it was committed, and not forgery in England where he was arrested. In the present case the offence is clearly forgery by the law of Canada, (32 & 33 Vict, ch. 19, secs. 26-45,) as well as in New Jersey, where the act was committed. The law at the time of the commission of an offence, and not at the date of the treaty, must govern. The recital in the treaty shews that the high contracting parties did not contemplate the then existing laws in the various jurisdictions for which they were negotiating, but laid down the simple rule that whatever should thereafter be held to be crimes of the nature specified in the treaty by the local law of the place where the offence was committed, and where the offender was found, there extradition should follow; and this violated no right of asylum in the territory of either party, for the local law of any territory could always decide what should or should not be an extradition offence.

The decision of the learned Judge of the Chancery Division (Proudfoot, J.), is not open to the objections made on behalf of the prisoner. The whole of the Imperial Extradition Act of 1870, including so much of the "First Schedule," as embraces the offences specified in the Ashburton Treaty, is in force in Canada, and the recital in the first schedule that the crime is to be construed according to the law at the date of the offence in the country where the offender is found, is not inconsistent with the treaty but harmonises completely with it, and is therefore in force in Canada: *Re Browne*, 31 C. P. 493 6 App. R. 396. And our own statute "The Extradition Act, 1877," (40 Vict. ch. 25), which has not yet come into force, has precisely the

same provision in the recital to its "Second Schedule," and is in express terms applied to the treaty with the United States.

November 28th, 1882. SPRAGGE, C. J. O.—It is established with sufficient certainty for the purpose of this application that the prisoner committed the act with which he stands charged, and that the act committed is forgery by the general law of the United States. The question for our decision is, whether the act is forgery by our law.

At the time of the entry in question the prisoner was chief clerk in the office of the Mayor and Common Council of the city of Newark, and it was part of his duty to receive taxes payable to the comptroller, and to make entries of sums received by him in a book which is produced to us—such book being the property of the municipality—and to pay over the same to the Treasurer of the city.

It appears in evidence that on a certain day, the 18th of March, 1881, he received several sums of money, among them three sums, the aggregate of which was \$562.32, and that he entered that sum in the right hand column, headed "total," of the book produced; that the figure 5 was partially erased and the figure 3 substituted in its place; and this it appears was done by him.

As the figure stood before the alteration the prisoner stood debited in the sum of \$562.32, and was in fact properly so debited. By the alteration he stood debited with \$200 less than he actually received. The effect of the alteration was to make him appear to be accountable to the corporation for \$200 less than the sum received by him on these three items, and this was manifestly to the prejudice of the corporation whose servant he was. That this was done fraudulently to conceal the abstraction of corporation moneys appears sufficiently by the evidence.

This falls clearly within the definition of forgery, as given by Sir William Blackstone, 4 Com. 247; "The fraudulent making or alteration of a writing to the prejudice of another man's right."

I incline to think that this entry was an accountable receipt within the Imperial statutes 2 Geo. II ch. 25, 7 Geo. II. ch. 22 and 31 Geo. II ch. 22, the 78th sec. of which latter Act extends the provisions and penalties of the previous Acts to the like offences when committed against corporations.

In the *King v. Harrison*, 1 Leach C. C. 181, an alteration was made in what may be called a pass-book, being a book in which the money transactions between a corporation called the London Assurance and the Bank of England were entered. The corporation paid into the bank £210, and a clerk in the bank made an entry in this book as follows: "1777, June 16th, bank notes C., £210," and to this the bank clerk signed his name. The prisoner prefixed the figure 3 to the sum in the book, making the sum received appear to have been £3,210. Two questions were submitted to the twelve Judges, the first being, whether the entry in the bank book could be considered in law as an accountable receipt. And the report states that the Judges were clearly of opinion that "an entry in a bank book is an accountable receipt within the meaning of the Act;" but that no public opinion was given; that the Judges directed the second point to be argued, which was never done, and the prisoner was afterwards pardoned.

The alteration of the sum named in the book over the signature of the bank clerk would, I take it, be a forgery of the name of the bank clerk; but the point material to this case, which was decided in that case, was, that the entry in the bank book was an accountable receipt.

The entry as altered made it appear that the prisoner had paid in £3,000 more than he had paid in, and that the bank clerk had received from him, by that amount, more than he had received. It was evidence to the prisoner's employers, to whom he was accountable, that he had paid £3,210. The alteration might have been by another hand, and in an opposite direction; £3,210 might have been paid in, and the figure 3 obliterated by some chemical substance (a mode of alteration practised in some cases) by the bank

clerk. Detection in that case would be easy, but that would not alter the nature of the offence. The material point is, that an entry in such a book is an accountable receipt.

In such a book entries are made, one under another, of sums received, and the party making them is accountable for the sums entered as received. There does not appear to me to be an essential difference between such a book and the book in which the entry in question was made. By the entry in the book in question for \$562.32 the prisoner made himself accountable for the receipt of that sum. It was one of several entries in the same page, just as several entries may be made in a bank book. And the moment such entry is made in such book—the book being the property not of the person making the entry, but of his employers—it stands as his receipt for so much money for which he is accountable to his employers.

*Moody's Case*, Leigh and Cave, 173, is a decision in the same direction. The prisoner was the paid secretary of a benefit society. The sum of £40 was given to him to deposit in the Huddersfield Savings Bank. This he did not do, but he delivered to the society a book in which was this entry: "Savings Bank, New St. Huddersfield, 1855, October 30th. Received £40." The entry was not in the handwriting of any officer of the bank. It was not proved in whose handwriting it was. The prisoner was convicted of uttering this writing knowing it to be forged. It was not denied that the entry was a forgery, but it was contended that the document was not a writing that would support the indictment. The case was tried before a Queen's Counsel, who submitted the case for the opinion of the Court, and it was considered in a full Court, composed of five Judges, by whom the conviction was unanimously supported. The judgment of Martin, B., is pertinent to this case. "The forged document, if genuine, would have been evidence that the bank had received the money, and were to be accountable for it. Then why is it not an accountable receipt?"

I have quoted these two cases principally upon the point that an entry of an item in a book purporting to shew the receipt of money is an accountable receipt, and that the entry in question here is an entry of that character. If a third person had altered this entry to a larger amount than that at which it originally stood, it would have been an alteration to the prejudice of the person who made the original entry, Hall the prisoner, and *Harrison's Case* would have applied to it. So if a third person had made the alteration which was in fact made by the prisoner, it would have been an alteration to the prejudice of the corporation, and if made with intent to defraud, the same case would have applied to it. It does not appear to me to make in reason any difference that the alteration that was made was made by the prisoner himself, or that it affected his own liability not the liability of a third person. The original truthful entry of \$562.32 was, with the book that contained it, the property of the corporation, and the alteration comes within the terms of 2 Geo. II. ch. 22: "Whoever shall falsely make, forge, or counterfeit \* \* \* any acquittance or receipt, either for money or goods, with intention to defraud," &c. In *Harrison's Case* it was an *alteration* that was held to be a forging.

Suppose the duties of receiving, entering in the cash book, and paying over to the comptroller, instead of being discharged by one officer, as was the case in this instance, had been distributed between two officers, the duty of Hall being to receive moneys and to pay them over, and the duty of the other officer to make the entries, and suppose the entry of \$562 to have been made by that other officer, and the figure 5 to have been changed to 3 by Hall in order to cover his defalcation, there would be no doubt that such alteration would be a forgery by Hall of the true entry made by the other officer. It would surely be a meaningless difference, that it should constitute the offence of forgery if the original true entry were made by the other officer, and not forgery if it had been made by Hall himself; the gist of the offence consisting in the alteration



of a true entry so as to make it represent that which is false.

It is, however, in my opinion immaterial to shew that this entry comes within the category of accountable receipts, unless it be to shew it to be a felony. The definitions of the offence referred to in several of the cases use the words "any writing." In 3 *Bacon's Abridgment*, Forgery, B., we find this passage, which is attributed to Gilbert C. B.: "But these opinions seem fully to be considered in a late noted case, where it was holden that the principle extended to instruments of every sort though without seal. The case here referred to is, *The King v. Ward*, reported in 2 *Ld. Raym.* 1461; and Sir William O. Russell, whose book on the Law of Crimes has been styled by English Judges an excellent treatise on that branch of the law, at p. 358 says, referring to the same case: "And this case is considered as having now settled the rule that the counterfeiting of any writing with a fraudulent intent whereby another may be prejudiced, is forgery at common law." The learned writer takes this from the very valuable prefatory remarks of Sir Edward Hyde East to his report of the same case, in his "Pleas of the Crown," vol. 2 p. 861.

*Windsor's Case*, 6 B. & S. 520 is, as I read it, a very different case from the one before us. The charge against the prisoner is thus stated in the judgment of Lord Blackburn: "That being a clerk in a bank he did embezzle or steal a large sum of money; that he made an entry in a book, stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false." That was simply a false entry, and nothing more. It was not, as Lord Blackburn puts it, "equivalent to forgery." That case might well be decided as it was, and the act committed by the prisoner in this case be adjudged to be forgery.

An act similar in its circumstances and character to the act in question before us, was adjudged to be forgery at common law by the Supreme Court of Pennsylvania, upon appeal from an able and elaborate judgment of the Court

below, in the case of *Biles v. Commonwealth*, reported in 8 Casey 529. That case of course is not binding upon us as an authority; but the decision proceeded largely upon English authorities, and the reasoning in the Court below and in the Supreme Court is applicable to the case before us.

With the exception of the case reported in Casey I have not met with any case very closely resembling the one before us in its circumstances, but *Harrison's Case* and *Moody's Case* are like this in principle, and I have found no case that is, in my opinion, an authority against it.

*Teague's Case*, 2 East P. C. 979, decides that altering is forgery; and *Ward's Case* establishes as a settled rule that forgery may be committed of *any writing*, when done with a fraudulent intent, whereby another may be prejudiced. The act of this prisoner is within the definitions of the best authorities to be found in our books. The tendency of judicial decision from the time of the Commonwealth, as well as the tendency of legislation, has been to hold the offence to consist in acts and in relation to writings, which in early times were not held to constitute the offence. The books abound with examples of this; the 32nd chapter of *Russell on Crimes*, contains many instances. I have quoted only from those which appear to have the closest bearing upon the case before us. I think we ought to apply the law to every case falling fairly within the definitions established now by judicial recognition which we find in the books. Whether the offence committed does or does not fall within these definitions is the general test: *Ritson's Case*, L. R. 1 C. Ca. R. 200, is one among a number of instances of this.

I have assumed that we must find judicially that the act committed constitutes forgery; that it is not sufficient to entertain the opinion that there is sufficient to warrant what I may call an *impression* that it does so. I incline to think that there is a substantial difference between the manner in which we should deal with the law and with the facts in an extradition case. It is sufficient if the facts before us establish a case which, if true, is reasonably sufficient to put the accused upon his trial; but it is, I

apprehend, incumbent upon us to see that the act charged constitutes an extradition offence ; and unless it is established as a matter of law that it is so, the accused ought not to be surrendered.

At the same time I entirely agree with those who think that it is in the interest of our country, as well as of the United States, that extradition of criminals should not be fenced round with the difficulties that it is. It cannot be to our interest any more than it is to our honour, that our country should be an asylum for forgers, cheats, and embezzlers, who can so easily transfer themselves from the scene of their nefarious practices in their own country to ours ; they are mere fugitives from justice, and I cannot but think that as few impediments as possible should be allowed to exist to their being returned to the country against whose laws they are offenders.

One thing is certain—that the prisoner is indebted to Mr. Bethune for a very able argument on his behalf.

Since penning the forgoing, I have read the judgment of my brother Patterson, which agrees in the main with the judgment of my brother Burton ; and in both of which the conclusion is arrived at, that the act committed by the prisoner is not in law forgery. I agree that statutes affixing penalties to acts therein described—in some cases the penalty of death—do not thereby make those acts forgeries. I referred to the three Acts of Geo. II., for the character of the acts and of the offences therein described ; the forging by making or altering of accountable receipts. Such acts were forgeries at common law ; but I referred to them perhaps unnecessarily, because they are in terms called by that name in those Acts.

My brother Patterson says, and I agree with him : “ A true instrument may be *altered*, and the alteration may be the means of making a false instrument, or, in other words, of forging ; but the *forged instrument* is not the original one, but that which has been produced by the alteration of the original. Therefore the forgery is the same whether effected by making an instrument which has no previous

existence, or by altering a genuine one." To apply this to the case before us, there was a true instrument—the true original entry of \$562.32. That was altered, and as altered was a false instrument, or in other words, a forgery; the forged entry is not the original instrument, but the forged instrument as produced by the alteration of the original; and therefore the forgery is effected in one of the two ways pointed out as the two ways in which it may be effected, viz., by altering a genuine instrument.

My learned brother has quoted from the judgment of Mr. Justice Lush, in the *Queen v. Ritson*, 1 C. C. R. p. 205. In order to a fuller understanding of the meaning of the learned Judge, I will quote an earlier passage in his judgment: "If the parties to this deed had inserted the true date in the first instance, and had subsequently altered it, there is no question that it would have been a forgery." This, if it be correct, as I think it certainly is, meets a difficulty that has been made in this case; that the making or altering, must be such as to make the writing or alteration purport to be the act of some other person. The passage: "It would be absurd to hold that an alteration might constitute a forgery, but that an original false making would not," applied to the case then in judgment where there was "an original false making," can mean only this: that an alteration of a true writing being clearly a forgery, it would be absurd to hold that an original false making would not be so.

The nine Judges in *Dunn's Case*, 1 Leach C. C. 57, could not have meant by the words, "in all forgeries the instrument supposed to be forged must be a false instrument in itself," that the alteration of a genuine instrument might not be a forgery, for they go on to speak of the alteration of an instrument. And it is quite clear from many cases that forgery may consist in the alteration of an instrument not a false but a genuine instrument.

I cannot attach to the passing of the Imperial Statute 38 & 39 Vict. ch. 24, the weight that is attached to it by my learned brother. It was passed because it had been

lately decided that a false and fraudulent entry made by a chief clerk in a bank, in order to conceal his defalcations, did not constitute the crime of forgery ; and Parliament legislating upon it thought fit to define a number of Acts, which it was enacted should be misdemeanors. It did not necessarily follow that none of the Acts enumerated in the statute were within the category of forgery before that time or that Parliament deemed them to be so. It might well be put upon the ground that it was expedient to place the law in relation to a certain class of persons and their employers upon a definite footing ; and, while remedying an admitted defect, to make a comprehensive enactment, that should cover such practices as had occurred in *Saunders' Case*, and with it, others of a cognate character.

I cannot but continue to think that the entry in question as it originally stood, was in its nature a receipt for \$562.32. It was a piece of evidence that he had received that sum. He had thereby charged himself with its receipt by a writing in a book, the property of his employer. It was at any rate a writing, which, being a true statement of a fact in the interest of the employer, the employer had a right to have remain there ; and the partial obliteration and change made by the prisoner, with the fraudulent intent with which undeniably it was made, was to the prejudice of the employer. There were, therefore, in my judgment in this act, all the elements necessary to constitute the offence of forgery.

BURTON, J. A.—By the 2nd sub-section of section 3 of the Imperial Act of 1870, it is provided, that a fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, (unless he has been restored, or had an opportunity of returning to Her Majesty's Dominions,) be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded.

The United States Government have refused to accede to this restriction, and the result is, that no order in council has been made applying that Act to the United States, but the 27th section provides, that notwithstanding the repeal of the Acts giving effect to the Ashburton treaty, the Act of 1870 shall (with the exception of any thing contained in it which is inconsistent with that treaty) apply in the case of the United States, in the same manner as if an order in council referring to it had been made in pursuance of that Act, and as if such order had directed that every law and ordinance which was in force in Canada with respect to such treaty should have effect as part of the Act.

We have, therefore, to decide whether this evidence discloses that the prisoner has been guilty of an extradition crime, within the meaning of the 10th article of the Ashburton Treaty, and the 31 Vict. ch. 94, and that must depend upon whether he has been shewn to be guilty of a crime which by universal acceptation is recognized throughout the United States and Great Britain as forgery.

I am unable to agree with the learned Chief Justice, that there is any evidence that the offence with which the prisoner is charged is forgery, by the general law of the United States. The only evidence adduced tended to negative it; I refer to that of the gentleman who was examined as an expert.

What may be the law in the particular State of the union of which he professed to speak, is not to my mind material. "We must assume," says Chief Justice Cockburn, "that the terms used by the parties to the Ashburton Treaty, especially as they were parties using the same language and with laws so like, used them in the sense which they bear in our own law, and in the law of the United States and not in that which they have in any particular State in the Union.

In my opinion, there is nothing by our own laws to constitute the offence forgery. The offence here charged, was making a false entry, for there can be no distinction, I

think, between an entry originally false and the alteration, in such a case as the present. That entry was made no doubt for a fraudulent purpose, that of covering his real offence, the embezzlement of money, but that is not forgery by the laws of England, and there being nothing to shew the contrary, the same must be taken to be the law of the United States.

What *Ward's Case*, so frequently referred to in the judgments, decided was that forgery was not confined to instruments under seal, but might be committed in reference to any writing, and no doubt the offence of forgery is not confined to the false making, but extends to the material alteration with intent to defraud, of any writing which if genuine might be of legal efficacy as the foundation of a legal liability.

The terms "writing," "instruments," and "written instruments," as pointed out by Sargent, J., in his very able judgment in the *State v. Young*, 46 N. H. 268, are used indiscriminately in defining forgery at common law. Thus Blackstone says: It is the false making of a "writing"; Baron Eyre says: It is the false making of an "instrument"; Grose, the false making of a "note or other instrument"; East, the false making of any "written instrument"; but no mention is anywhere made of accounts or books of account. What these learned commentators and Judges had in their minds, when giving these definitions, were writings or written instruments as contra-distinguished from specialties, or instruments under seal, although I must not be understood as meaning that an account, or book of account may not be the subject of forgery, under the same conditions upon which any other writing may be forged, either by false making or alteration.

And I apprehend that it was not intended, in our Acts respecting forgery, to make any alteration in relation to the forgery of instruments or documents, but simply to declare those offences which, at common law, would have been merely misdemeanors, to be felonies, and to subject the parties found guilty of them to certain punishments.

The rule then would seem to be, that the writing or instrument which may be the subject of forgery, must generally be, or purport to be, the act of another.

There is one exception to this rule, that a person may be guilty of the false making of an instrument, although he signs and executes it in his own name, in case it be false in any material part and calculated to induce another to give credit to it as genuine and authentic when it is false and deceptive.

Such in fact comes within the first of the definitions given by Sir FitzJames Stephen, in his admirable Digest of the Criminal Law, as to what constitutes making "a false document"; viz., to make a document, purporting to be what it is not, and he refers to the case of *Regina v. Ritson*, L. R. 1 C. C. R. 200, as an illustration; the deed in that case having been antedated for the purpose of fraud.

There was nothing novel in that decision, as the same rule will be found laid down in Coke, in 1 Hale's Pleas of the Crown, 683; 1 Hawkins, P. C. 263; 2 East, P. C. 855.

I have stated the rule to be, that the writing forged must generally be, or purport to be, the act of another, or an instrument fraudulently purporting to be what it is not. Or, to proceed with what I understand to be the rule, it must at the time have become the property of another, or be some writing or instrument under which others have acquired some rights, or have become liable in a certain way, and when those rights and liabilities are sought to be affected by the alteration.

I have already stated that an account or book of account may, under certain circumstances, be the subject of forgery; but what I wish to point out is, that it would, I think, have astonished those sages of the law from whose definitions I have quoted, to find their definitions doing duty in a case like the present, when the party whose business it was to keep the books fails in his duty, and makes a false entry, or alters one already made, for the purpose of covering up an offence he had already com-



mitted, the embezzlement of money, which formed no portion of the moneys respecting which the entries were made.

The account in either case remains precisely what it purported to be, the statement of the man who made it; it is still a genuine writing or paper, though the statement it contains is false.

It appears to me that if this can be regarded as a forgery it must equally have been a forgery when the false entry of \$282.52, instead of \$482.52 was made. It was false, but that is not sufficient; to forge a writing necessarily implies that a writing be made which shall appear and purport to be something which it is not in fact, or that a writing be so changed, or altered that it shall not be, or purport to be, what it was designed to be.

The idea I wish to convey is so very clearly expressed in the able judgment of Mr. Justice Sargent, to which I have referred, that I may be excused for transferring the portion in question to my own. "To forge," he says, "is to *falsely make*, and an alteration of a writing must be *falsely made* to make it forgery at common law. The term *falsely* as applied to making or altering a writing, in order to make it forgery, has reference, not to the contents or tenor of the writing, or to the facts stated in the writing, because a writing containing a true statement may be forged as well as any other, but it implies that the paper or writing is false not genuine, fictitious not a true writing, without regard to the truth or falsehood of the statement it contains; a writing which is the counterfeit of something which is, or has been a genuine writing, or one which purports to be a genuine writing when it is not. The writing or instrument itself must in itself be false not genuine, a counterfeit, and not the true instrument it purports to be."

In the present case the account may or may not have contained false entries, but still it is what it purports to be, it would be his own true writing; however false the statement it contained, when he alters those entries to

make them more true or more false, so far as the matter referred to in the entry is concerned, still it remains what it purports to be, his account. The character of the account as being false or fictitious instead of genuine, is not altered by the truth or falsity of the statement that it contains.

I am unable therefore, in such a case as this, to draw any distinction between an entry false at first and one made false by an alteration.

Nor do I follow Mr. Bishop's reasoning when he attempts to draw a distinction, as he does at p. 323 sec. 587 of vol. 2 of his book on Criminal Law, between fraudulently altering the books of account and simply making a false entry ; in the former case he suggests that it ceases to be what it purports to be, viz., the actual record of transactions when they occurred ; in the latter, it is merely a false record.

Assuming that the original entry had been \$462 instead of \$562, it would not have been an actual true record of the transaction, and yet the alteration would according to the reasoning be forgery, whilst the original entry itself, which would not correctly record the transaction, would not. The reasoning is very subtle, and the distinction excessively refined ; and I am not surprised, therefore, to find that there is only one reported case, and that one not binding upon us as an authority, to be found in support of such a doctrine. I refer to the case of *Biles v. The State*, to be found in 8 Casey, which elicited the comments of Mr. Bishop, to which I have referred.

It is frequently said that American cases, though not binding as authorities, are valuable for the reasoning they contain upon the point discussed. I confess I am not impressed by the reasoning in that case as establishing this to be the offence of forgery ; but were it otherwise, it ought not to govern us when opposed to actual authorities in our own Courts, and I am of opinion that it is directly so opposed to *Re Windsor*, and to the more recent decision at the Assize Court before Mr. Baron Pigott, in the case of *The Queen v. Saunders*.

• The distinction is, that in the American Court the learned Judge moulded the judgment so as to convict the prisoner of an offence which was not an offence at common law. In England the prisoner was allowed to escape and the aid of the Legislature invoked to prevent any further failure of justice from the same cause, the 38th and 39th Vict. ch. 24, having been passed to make the falsifying or altering of accounts under circumstances like the present a statutory offence.

I have not specially referred to a point, alluded to in some of the judgments we have seen, to the effect that it is immaterial whether any person was actually injured or not provided he might be thereby prejudiced, inasmuch as it is, I might say, an elementary proposition, with those familiar with the administration of criminal justice, that in cases of forgery the intent to defraud is presumed, if there be a person in existence capable of being defrauded. Yet it must not be lost sight of, that the fraud and intention to deceive constitute the chief ingredients in the offence.

I do not myself see how any one was in that position in the present case. The city was not defrauded by the alteration *per se*, but by the embezzlement which the false entry and the alteration in the book were resorted to to conceal. The essence of forgery is, that the document itself should be made the instrument of fraud.

I confess I am unable to distinguish this case in principle from the *Queen v. Saunders* and *Re Windsor*. The latter case was decided by three eminent Judges in 1865. The charge there was, that the prisoner was guilty of forgery, in this, that he did feloniously, with intent to defraud the bank, make certain false and fraudulent entries in the books of account *kept by the bank*, whereby the bank was defrauded. It is true that the entry was not altered after it was first made, but I have endeavored to point out that that cannot affect the question. Lord Blackburn in his judgment in that case says: "The charge against the applicant is, that he being a clerk in a bank, did embezzle or steal a large sum

of its money, that he made an entry in a book, stating on his behalf, that a certain quantity of specie was deposited in a vault, that statement being false," (and he might have added that it was part of his duty to make that entry), and he proceeds. "But that is not equivalent to forgery. Forgery is the falsely *making* or *altering* a document to the prejudice of another, by making it appear as the *document of that person*. Telling a lie does not become forgery because it is reduced to writing. *Here this man has not made any false statement purporting to be on behalf of any other person, but a statement purporting to be what it is.*"

That differs in no one respect from the present case, except that the false statement was an original entry, and not an altered one; but the latter portion of his Lordship's remarks, which I have underscored, shews that that circumstance would make no difference. There appears to be some misapprehension in the minds of some of the Judges below, as to the book in that case not being the property of the bank. It is so described in the charge and in the evidence.

The cases referred to of *Regina v. Harrison*, 1 Leach 180; *Regina v. Smith*, 9 Cox 162; *Regina v. Moody*, 1 L. & C. C. R. 173; are all clearly distinguishable, and have not a feature in common with the case we are now considering. In *Harrison's Case*, the Bank of England furnished the London Assurance Company, to whom the prisoner was accountant, with a book, the heading of which was: "Dr. The Bank of England with the London Assurance Company." On the debtor side, the clerk of the bank, when any money was paid in; entered the date and what it was that was paid in, then he signed his name, and afterwards wrote the sum, putting a bar or dash before the figures in order to prevent another figure being prefixed or subjoined.

The forgery consisted in altering an entry in this book of a sum in bank notes, £210, which was made by a clerk of the Bank of England, who had received the money, by prefixing the figure 3, making thereby, the sum received appear to be £3,210.

The prisoner was discharged in that case, because in accordance with the strict rules observed in the administration of criminal justice, the Judge held that the word person in the statute did not include corporations; but if he had been indicted for forgery and it had become necessary to decide it, there could be no doubt that the offence would fall within the definition of forgery, as in effect altering a receipt of another person, the bank clerk who had granted it.

In the case of *Regina v. Smith*, 9 Cox 162, the prisoner produced to the society, not the actual pass book kept between the society and the bank, but a fictitious book, which did not truly represent the state of the account, and he was held guilty of forgery. And the *Queen v. Moody*, 1 Leigh & Cave C. C. 173, is to the same effect. But these cases proceeded upon the ground that the forged document would, if genuine, have been evidence that the bank had received the money, and would be accountable for it.

We cannot but regret that the negotiations between the two countries have not resulted in full effect being given to the Act of 1870, so that the prisoner might be extradited for the embezzlement, of which there appears to be no reasonable doubt of his guilt; but we have to administer the law as we find it, and not to strain it to meet a particular case; and I have no hesitation myself in coming to the conclusion that the evidence in the case does not establish the crime of forgery within the meaning of the Ashburton Treaty, and that the prisoner is entitled to his discharge.

PATTERSON, J. A.—The information on which the prisoner is charged was laid before the Judge of the County Court of the County of York, on the 12th of June, 1882, by John T. Rever of the city of Newark, in the State of New Jersey, detective, who swears, on information and belief, that Hall did, on the 18th March, 1881, feloniously forge a certain account of the Comptroller of the said city of Newark, by feloniously altering the amount of moneys

received by said Comptroller on the said 18th day of March, at page 271 of Cash Book K, of the said Comptroller, from the sum of \$562.32 to the sum of \$362.32, with intent to defraud; and also that he feloniously, uttered, knowing the same to be forged, the aforesaid account and book, with intent to defraud.

Upon this information the Judge issued his warrant, and upon it Hall was arrested and brought before the Judge, who remanded him for extradition on the 20th June, 1882.

The prisoner was brought on *habeas corpus* before Mr. Justice Osler, who remanded him to custody again upon the original warrant of commitment, and he was again brought before the Chancery Division of the High Court of Justice, with the same result.

The present appeal is brought under the ninth section of the Statute R. S. O. Ch. 70, from the decision of the Chancery Division.

The materials before the County Judge consisted partly of evidence taken in New Jersey, and partly of evidence taken before himself.

Gustavus N. Abeel, prosecutor of the Pleas for the State of New Jersey in and for the County of Essex, as he describes himself in his evidence, laid an information on the 9th of June, 1882, before a Justice of the Peace at Newark, which is produced in evidence. In it he charged that Hall, being the chief clerk in the office of the Mayor and Common Council of the city of Newark, and being in charge of the Cash Book of the Comptroller of that city, being one of the account books of said city, did unlawfully, wilfully, and feloniously forge, alter, and falsify certain figures theretofore made in said Cash Book, with intent to defraud the said the Mayor and Common Council of the said city of Newark of \$200. On the same 9th of June, the Justice issued his warrant upon Abeel's information, for the apprehension of Hall. That warrant is also produced, and with it several depositions made the day before—viz. on the 8th of June,—at Newark, before

the same Justice. These are the depositions of James Yalden, an accountant; of Daniel W. Baker, the Comptroller; of William H. Winans, the city Treasurer of Newark; of Thomas O'Connor, an assistant of Yalden; and of William A. Carter, treasurer of the Newark Savings Institution. We have in addition to these, the examinations before the County Judge of Mr. Abeel for the prosecution, and of three witnesses—viz., Edward P. Simpson, Thos. H. Sheppard, and O. B. Sheppard—called for the prisoner.

The testimony of these witnesses, together with the book containing the alleged forgery, and another book from the Comptroller's office, with some other papers, form the evidence.

Mr. Baker, the Comptroller, states that on the 18th of March, 1881, Hall was chief clerk and cashier in his office, and that it was his duty as such cashier to pay to the credit of William H. Winans, treasurer of the city of Newark, the sums received by him upon the said 18th March, 1881. It has been explained to us, and it appears from what is thus stated by Mr. Baker, who, however, speaks only of the day of the alleged forgery, and from reference to the account books and other parts of the evidence, that the course of dealing was to pay over at the close of each business day, to the treasurer, the money paid that day into the office of the Comptroller. Each day's transactions were thus closed, and a receipt given by the treasurer upon the page of the cash book, which shewed the day's receipts. This book was kept by Hall. It was ruled with a number of columns headed with the designations of the various matters, principally classification of taxes, for which money was receivable. Moneys received from tax payers would be entered in the appropriate column, and the total sum extended in the last column of the page, which was headed "total." The addition of this column shewed the amount to be paid over to the treasurer.

On the 18th of March, 1881, moneys were received to the amount of \$4,720 32. Of this amount the sum of

\$4,094.60, was paid by a cheque of the Newark Savings Institution. It does not appear how the rest was paid, but it was probably in various sums of cash. The sum of \$4,094.60 was made up of six separate accounts or items. These were entered upon six lines of the cash book, not in consecutive entries, but interspersed amongst the other entries on the page, being apparently brought into the cash book from other books, one of which—viz., the real estate arrears book,—is before us. Each item was distributed amongst the analytical columns, and the whole item extended in the “total” column. One of these items was \$562.32. It was in respect of arrears of taxes on real estate, and was composed of three charges—viz., \$7.70, \$72.08, and \$482.54, all of which are shewn in the real estate arrears’ book. In the cash book they should have been entered in the columns headed respectively “contingent,” “interest,” and “tax.” The first two were correctly entered; but the prisoner, instead of entering the third correctly, made his entry \$282.54. This would make the total \$362.32, in place of \$562.32. The prisoner appears to have inserted in the “total” column the latter amount, which was what he had really been paid, and then to have scratched out part of the figure 5 and altered it, over the erasure, into 3. He made the addition of the whole column, \$4,520.32, which was the correct addition of the figures as altered, in place of \$4,720.32, and paid over to the treasurer the smaller sum only—thus embezzling \$200. The money embezzled was not part of the \$562.32, because that sum was included in the \$4,094 cheque, which was payable to Mr. Baker and indorsed by him for deposit to the credit of the treasurer. It was abstracted from the other moneys, and the fraudulent entries were made to conceal the theft.

An essential element of the crime of forgery is the intent to defraud. The fraudulent intent in the present case was to facilitate the theft of the \$200. The principal offence was the stealing of the money; the falsification of the book was subsidiary to it. There is ample evidence of



the commission of the principal offence. Had it been committed here, or had the prisoner been apprehended or brought to trial in the State of New Jersey, he would doubtless have been tried upon the charge of embezzlement; but embezzlement not being, as forgery is, an extradition crime under the Ashburton treaty, the charge is put in its present shape. If forgery is made out, we must of course so decide. It is, however, impossible to avoid seeing that the prisoner, if surrendered, will have to answer, in effect, the charge of embezzlement, whether he is in form indicted for embezzlement or forgery. We may feel that this will be no injustice, and that he ought to be punished for the crime he committed; but that is a consideration which we are not at liberty to entertain. We are bound to see that the act done really constitutes forgery, and to be on our guard against letting the natural desire to aid in what may seem to be justice, lead us to construe the law less strictly than we should do if trying a similar charge in one of our own Courts. The extension of the list of extradition crimes contemplated by the Imperial Extradition Act, 1870, has not taken place with regard to the United States of America, because, as we are given to understand, no provision has been made in that country, as required by the third section of that Act, that the fugitive criminal shall be tried only for the extradition crime proved by the facts on which his surrender is granted. We have therefore two special reasons for caution in considering the question before us; viz., to avoid extending, by the indirect effect of our decision, the operation of the treaty to an offence of a class which, for reasons of policy prevailing when the treaty was made, was purposely excluded from it; and to avoid the creation of a precedent which may prove embarrassing in the administration of our own criminal law.

A good deal has been said on the subject of forgery at common law, and forgery as dealt with by statute, and as to whether a charge for an offence created by statute since 1842, when the Ashburton treaty was made, could be treated as an extradition crime under that treaty.

The first schedule to the Extradition Act, 1870, contains a list of the crimes which are extradition crimes under that Act, and includes those specified in the Ashburton treaty. Its heading is: "The following list of crimes is to be construed according to the law existing in England or in a British possession, (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act." It has been discussed whether the operation of the Act, and its application under sec. 27, to the Ashburton Treaty, extends this rule of construction to cases of extradition under that treaty.

These questions do not seem to me to be pertinent to our present inquiry, although they would doubtless be so in relation to some of the crimes in the list.

There is no case, so far as I am aware, in which our statutes declare an act to be forgery which would not be forgery at common law. They nowhere define forgery, nor declare that any particular act shall be deemed to be forgery. They attach to the forgery of a great variety of instruments the stigma of felony, and award punishments which may be more or less severe, though they all fall far short of that which was attached to such of the offences as were the subject of legislation before the present century—viz., death, without benefit of clergy. But they deal thus with forgery as something requiring no definition. Sometimes they attach to conduct which is not spoken of as forgery, penalties similar to those applied to forgeries, but without making or declaring such conduct to be forgery. For example, take the eighth section of the Forgery Act, 32 & 33 Vict. ch. 19, D., which deals with the wilful making of any false entry, or wilfully altering any word or figure in books of account kept by the Government of Canada, &c., with intent to defraud. These enactments do not resemble in this respect the Statute of the State of New York, which was the subject of the decision in *Re Windsor*, 6 B. & S. 522, which declared that any person convicted of conduct like that described in this eighth section *should be judged guilty of forgery* in the third degree.

Now, as we are not concerned with the punishment, and as for the purposes of the treaty it matters not whether a forgery is a felony or a misdemeanor, we do not advance the discussion by referring to the statutes, unless they may happen to throw light upon the question of what instruments were at common law the subjects of forgery. Whatever forgery is made punishable under them, must have been already forgery. This, I take to be true as a general proposition. I believe it will hold good in every case; but I am satisfied it does so with regard to all those things which can touch the present discussion. If I am right in this view of the statutes, it will follow that several of the cases cited to us, such *e. g.*, as *Harrison's Case*, Leach 166, and *Re Moody*, 9 Cox 162, which were decided upon the effect or application of statutes, will only aid us indirectly.

Another question debated before us, was the difference between altering so as to falsify an entry which was originally correct, and making a false entry in the first place. For the prosecution, it was insisted that there is a material difference. Indeed the prosecution may be said to be founded upon that contention. The charge as set forth in the informations, both as laid by Mr. Abeel in New Jersey, and as laid by Mr. Rever here, is for altering the figure 5 into the figure 3. No allusion is made in those documents to the false entry in the "tax" column of \$282.54, or the addition of the "total" column, or the addition of the "tax" column, though the amount in each case, while correct as giving the sum of the entries as they stood, was fraudulently incorrect to the extent of \$200.

In my opinion the contention for the prosecution mistakes the meaning and force of the word "forgery."

The definitions of the word which are always resorted to are collected in Mr. Justice Taschereau's very excellent treatise on our Criminal Statute Law, vol. 1, p. 39. I shall quote them from that book at some length, for the purpose of shewing that they substantially agree in the particular which touches the point I am now considering, notwithstanding an expression in one of them which at first sight is perhaps calculated to mislead.

The first is from Coke, 3rd Inst. 169 : "To forge is metaphorically taken from the Smith who beateth upon his anvil, and forgeth what fashion and shape he will : the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word to forge, is *falsare* or *fabricare*."

Taking this as the fundamental definition, I call attention to the fact that the instrument which is forged is that which is the product of the act of forging, that which is falsely made or fabricated. The fabrication may be by making that which before had no existence, or by altering an instrument so as to make it different from what it was. In either case the *forged* instrument is that which comes from the hand of the forger. A true instrument may be *altered*, and the alteration may be the means of making a false instrument, or in, other words, of forgery ; but the *forged instrument* is not the original one, but that which has been produced by the alteration of the original. Therefore the forgery is the same whether effected by making an instrument which had no previous existence, or by altering a genuine one. I think the other definitions, which I now proceed to notice, bear out this view.

"In *Coogan's Case*," 1 Leach 448," Mr. Justice Tacheau goes on to remark, "Buller, J. said : 'It is the making of a false instrument with intent to deceive' ; and Eyre, B., in Taylor's case, defined it to be 'a false signature made with intent to deceive.' In the word 'deceive' must doubtless be intended to be included an intent to 'defraud',—and so it was defined by Grose, J., in delivering the opinion of the Judges, in *Parkes v. Brown*, viz. : 'the false making a note or other instrument with intent to defraud.' Again, Eyre, B., in the case of *Jones v. Palmer*, defined it to be 'the false making an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons' : 1 Leach, 367 ; 2 East. P. C. 853. And East himself, 2 P. C. 852, says, 'forgery at common law denotes a false making, which includes every alteration of or addition to a true instrument, a making, *malo animo*,

of any written instrument for the purpose of fraud and deceit.' "

Then follows an extract from the 3rd Report of the Criminal Law Commission, 10th June, 1847, p. 34: "Forgery is the false making of an instrument with intent to prejudice any public or private right;" and the following passage from 2 Bishop's Criminal Law, 523: "Forgery is the fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy."

In all these authorities the language employed clearly treats forgery as the production of the false thing, whether it is produced by the alteration of another or by original fabrication.

One other, which is cited in the treatise and which is often quoted, is the definition given in Blackstone's Commentaries, vol. 4, where the author says: "It may with us be defined, at common law, to be the fraudulent making or alteration of a writing to the prejudice of another man's right." This is the language to which I alluded as perhaps calculated to mislead by apparently treating the making and the alteration of an instrument as different things. No doubt they are so, as regards the actual operation which is performed; but as regards the commission of forgery, they do not differ. The definition is a definition of forgery; and forgery, the author tells us, may be committed, or in other words, the forged thing produced, by making a writing, or by altering a writing. The language does not necessarily convey anything different from the other *dicta* which I have quoted. If it did so, we should have to pronounce it erroneous. It is less precise than the others, which may not be a matter of surprise when the character of the work, as a general dissertation upon the law, is considered, this want of precision did not escape the notice of the learned author of Stephen's Commentaries, who adopts the text of Blackstone as the basis of his work. He adds to Blackstone's definition the words of Eyre, B., already quoted, making the sentence read thus: "It may with us be defined at common law to be the fraudulent

making or alteration of a writing to the prejudice of another man's right, and so that the instrument shall purport on the face of it to be good and valid for the purposes for which it was created :” 4 Steph. Com, 205. *The instrument* is here, as in all the other cases, that which is fabricated, whether by making or by altering.

In the case before us the charge is in respect of the entry of \$362.32. If there is a forgery, it is a forgery of that entry, not of the original entry of \$562.32. True, the original entry was *altered*, but alteration of a document is not an extradition crime, simply as alteration, however fraudulent. Whether it is a crime at all, except when so declared by statute, we need not now consider. It is only when the alteration is the means of forgery, and when therefore, the act of alteration amounts to forgery, that it comes within the scope of proceedings like the present. That *alteration* may be punishable as a crime, without amounting to forgery, is shewn by various enactments. One very distinct instance of this is found in the eighth section of the Forgery Act, to which I have already adverted ; but the same thing appears in every section of the statute which declares that whoever shall forge *or alter* an instrument shall be punished ; and if the distinction between forging and altering, which the Legislature thus marks by the use of both terms, would derive emphasis from a different arrangement of the words, we have only to read the Statute 7 Geo. II., ch. 22, where “alter” stands before “forge.” If the alteration amounts to forgery, then, upon the grounds I have discussed, what is forged is not the genuine entry, but the false one. This distinction will be observed in many cases, indeed in most of those for felonious forging under the statutes. *Harrison's Case*, Leach 166, may be referred to as amongst the earliest. The indictment was under the Statutes 2 Geo. II. ch. 25, and 7 Geo. II, ch. 22. The former made it a capital felony to *make, forge, or counterfeit* any acquittance or receipt, not using the word “alter ;” and the latter awarded the same punishment to any person who should

falsely make, *alter*, forge, or counterfeit the number or principal sum of any accountable receipt for any note, &c. What the accused had done was to prefix the figure 3 to the figures 210 in an entry in the bank book of the London Assurance Company, of which company he was accountant, making it appear that bank notes to the amount of £3,210 had been paid into the Bank of England, in place of £210, which was the amount actually paid in and entered by a clerk of the bank in the book. The counts under the first statute charged the *forging* of a receipt for £3,210: those under the second statute did not charge forgery, but were for *altering* an accountable receipt for £210, by prefixing the figure 3. The prisoner was acquitted on the first set of counts and convicted only upon those under 7 Geo. II. ch. 22. The conviction was therefore for altering, and not for forging. I do not doubt that the facts would have sustained an indictment under the last mentioned statute for *forging* an accountable receipt for £3,210, but as the actual charge was for altering and not for forging, the only point which the case can be said to decide is that which was expressly decided in it, viz., that an entry in a book such as the bank book of a sum of money paid in as a deposit, is not an accountable receipt.

It is a mistake, unless I greatly misunderstand that decision, to treat it as deciding that the alteration for which the conviction was had was forgery. The case serves the purpose for which I refer to it, as an example of the distinction between *altering* as an act made punishable in the same way as forgery, and *forgery* committed by making a fraudulent alteration. An example to the same effect is found in an American case, which was cited to us—viz., *Barnum v. The State of Ohio*, 15 Ohio 717, in which a receipt in full of all demands, dated in 1841, had been altered so as to make the year read 1844. In this, as in *Harrison's Case*, and elsewhere, the *forgery* related to the altered document, and the charge of *altering* to the genuine one. I may here observe, although the remark more properly belongs to another branch of our subject, that this



case of Barnum is by mistake referred to in the judgment in *Biles v. Commonwealth of Pennsylvania*, 32 Penn., or 8 Casey, 529, as holding the fraudulent alteration of a *book of account* to be forgery; whereas its only connection with a book of account was that the receipt which was altered was written across the page of an account book, and acknowledged the settlement of the account upon that page in full, as well as all demands to date.

In the case in 8 Casey, upon which I have some further remarks to make, it seems to have been thought that the alteration of a writing might be forgery, when the fabrication, by any other means, of a writing similar to the altered one, would not equally be forgery. I am not sure that the expressions to which I attach that meaning were intended to be so understood. If they were not, then there is no case that I am aware of in which such a suggestion has received any countenance. On the other hand I may refer to the judgment of Mr. Justice Lush, in *Regina v. Ritson*, L. R. 1 C. C. R. 200, 205, where he is reported to have said: "It would be absurd to hold that an alteration might constitute a forgery, but that an original false making would not. We could not yield to such a distinction unless we were obliged. I am satisfied that 'forge,' in sec. 20 of 24 & 25 Vict. ch. 98, should be understood in the sense in which that word is used in the authorities, new and old, on the subject. To make a deed appear to be that which it is not, if done with a fraudulent intent to deceive is a forgery, whether the falsehood consist in the name or in any other matter." The forgery in *Ritson's Case*, it will be remembered, was committed by making a deed which although the deed of the parties whose deed it purported to be, was ante-dated by them for the fraudulent purpose of causing it to appear to have been made at a time when there was no such deed. It was, as Blackburn, J., characterized it, not merely a deed containing a false statement, but a false deed. The remarks of Lush, J., were made in confutation of an argument of counsel, that to constitute a forgery there must be either—first, a false name; or



secondly, an alteration of another's deed ; or thirdly, an alteration of one's own deed.

It thus appears to me beyond question that the entry of \$362.32, if a forgery, is so not because the alteration of a genuine entry was the mode by which it was effected, but solely because it is false and has been made so for the purpose of fraud ; and that the case is precisely the same as it would have been if the entry had been originally written as it now appears. I see no distinction between it and the other false and fraudulent entry of \$282.54.

Then is it a forgery? The answer to this must, in my judgment, turn upon the question whether a *false instrument* or a *false writing* is the same as an *untrue writing*, or a writing which states that which is false. I find no authority for so holding, but much the other way. I shall presently refer to some of the cases, but I desire, before doing so, to notice a matter which was pressed in argument, but which I do not think affects the question. It was argued that the entry is an accountable receipt, or at all events a receipt or acquittance for money, and that what was done here might have been the subject of indictment under the Statute of 2nd Geo. II. ch. 25, which enacted that whoever should falsely make, forge, or counterfeit \* \* any acquittance or receipt for money or goods, should suffer death without benefit of Clergy ; or under 7 Geo. II. ch. 22, which punished in the same manner the falsely making, altering, forging, or counterfeiting, &c., the number or principal sum of any accountable receipt for any note, bill, or other security for the payment of money, or any warrant or order for the payment of money or delivery of goods with intention to defraud. It is clear that no charge could have been made under 7 Geo. II. ch. 22, because that statute does not deal with receipts for money, but only with receipts for notes, &c. But as to both statutes, I have merely to repeat a remark already made—viz. that they do not create the offence of forgery with relation to the instruments they deal with. Like all the other statutes, they merely fix the punishment for

what was already forgery ; and therefore if they or the cases decided under them are of any service to us in this discussion, it is only by the indication they afford that the instruments they mention were the subjects of forgery at common law. It cannot now be questioned that a receipt may be the subject of forgery, whether merely an acquittance or an accountable receipt. If the entry now in question is a receipt of either kind, and is forged, the crime will be forgery at common law whether punishable under the statutes or not.

I think the weight of authority is decidedly against treating the entry as a receipt. I shall refer to this again when noticing the cases. But on the more general question, I am of opinion that it is not forgery.

The writing is just what it purports to be—viz., the account of the day's transactions entered by the prisoner in the book provided by the city for that purpose. It is true the transactions are not correctly entered, but some of the entries are false and are fraudulently so. Still it is a genuine and not a fabricated document or writing. I cannot better express my meaning than by adopting the language already quoted by my brother Burton, from the very able judgment of Mr. Justice Sargent, in delivering the judgment of the Supreme Judicial Court of New Hampshire, in *State v. Young*, 46 N. H. 266 : "The term *falsely*, as applied to the making or altering a writing in order to make it a forgery, has reference not to the contents or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains—a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not. The writing or instrument must, in itself, be false, not the true instrument which it purports to be."

This statement of the law is, I think, fully borne out by the English cases. I have already noticed the distinction made by Blackburn, J., between a false deed and a deed containing a false statement, in *Regina v. Ritson*. I quote the remark from the report in L. R. 1 C. C. R. I think it is not noted in the report in 11 Cox.

In *Re Windsor*, 6 B. & S. 522, the Government of the United States of America claimed the extradition of the prisoner on a charge of having feloniously, and with intent to defraud a bank in New York, made certain false and fraudulent entries in the books of account kept by the bank, whereby the bank was defrauded of \$200,000 and upwards, contrary to the statutes of the State of New York.

Windsor was paying teller of the bank, and as such had charge of and was accountable for the cash of the bank, and the false entry was an entry of \$200,000 odd as assets of the bank. The facts were essentially the same as in the case before us, leaving out the incident of alteration, which in my view, is an immaterial fact. One question in the case was, whether the facts shewed forgery by the law of England. Cockburn, C. J., stated in his judgment, that it was clear for the reasons given by the members of the Court during the argument, that the offence did not amount to forgery. Looking at the report of the argument I find the following remark of the Lord Chief Justice: "We must take the term 'forgery' in the Extradition Act to mean that which by universal acceptation it is understood to mean, namely, the making or altering a writing so as to make the writing or alteration purport to be the act of some other person which it is not." What was said by the other Judges who heard the case does not appear from the regular report, but in the Jurist report, (11 Jur. N. S. 808), the remark is attributed to Blackburn, J., that "The entry made by the prisoner in the book simply states a falsehood; how can that be said to amount to a forgery?" and Shee, J., is reported to have said: "All that it amounts to is this, that the prisoner makes a written misstatement to his

employers." The subject is touched by both Blackburn and Shee, JJ., in their judgments, delivered after the argument. The language of the former learned Judge might have been used in the present case. I quote from the report in the *Jurist*: "Now the real charge against this person is, that being a clerk in the employ of a certain corporation, he had embezzled certain of the moneys of his employers, and that he made false entries in a book kept by the corporation, for the purpose of concealing his fraudulent conduct. The entries however, false and fraudulent as they were, do not constitute forgery, which crime consists in the making of a false instrument, which purports to be what in fact it is not. A simple lie, reduced to writing, does not thereby become forgery." It is worth noting that the counsel for the prosecution, H. S. Giffard, Q.C., and Poland, did not fail to urge the considerations, which have also been pressed before us, that the effect of the entry was to discharge the prisoner as having accounted for the money coming into his hands, and to afford evidence against the corporation of the amount in their hands.

*Windsor's Case* was decided in 1865. Ten years later one Saunders was indicted for forgery and embezzlement. He had overdrawn his account with the bank of which he was chief clerk, and of one of whose branches he was manager; and to conceal his defalcation, he falsified the accounts by debiting a customer with £1000, and crediting himself with a like sum. The charge of embezzlement could not be made out, and it was held, following *Re Windsor*, that he was not guilty of forgery.

The law acted upon in *Windsor's Case* was the same which, a century earlier, governed the action of the Judges in *Dunn's Case*, Leach's C. C. p. 54, of 2nd ed. Elizabeth Dunn represented herself to be Mary Wallace the widow and executrix of John Wallace, a sailor, and in that character induced a Mr. Hooper, a prize agent, to advance her some money, pending the steps required to obtain the arrears of wages due the deceased. She gave her promissory note for the money, signing with her mark as Mary

Wallace. Ten Judges met to consider whether this was forgery. "Mr. Justice Aston was of opinion that it was no forgery, but at most a mere fraud in assuming a false name. That to constitute forgery, the *instrument itself* must be false; and the merely assuming of a fictitious name to it will not make the instrument itself a forgery, \* \* \* But the nine other Judges were of opinion that this was a capital forgery. They agreed that in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note *entirely as his own*, his subscribing it by a fictitious name will not make it a forgery, the credit being wholly given to himself, without any regard to the name, or without any relation to a third person." I need not follow the reasoning upon which the note was held by the nine Judges to be a *false instrument*. The difference between them and Mr. Justice Aston was not as to the rule of law, but only as to its application to the facts; and the result was, that on account of the difference of opinion, it was agreed to recommend the prisoner to mercy.

In consequence of the decision in *Saunders's Case*, the Imperial Statute 38 & 39 Vict. ch. 24, was passed. It is stated in an article in the "Law Times," vol. 59, p. 133, to which we have been referred, and which contains the only account I have seen of the case decided, that the act was understood to have the sanction of the Judges. In moving the second reading of the bill in the House of Lords, the Marquis of Lansdowne informed the House that it had the approval of the law officers of the Crown, and mentioned, as an example of the necessity for such legislation, a recent case (evidently *Saunders's Case*) where the manager of a large banking firm, being in difficulties, transferred the money of a client to his own account; and in which, though the case was clear, a conviction was impossible (*Hansard*, 28th May, 1875.)

The Act provides that if any clerk, &c., shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or

account which belongs to or is in the possession of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter or concur in omitting or altering any material particular from or in any such book or any document or account, then in every such case the person so offending shall be guilty of a *misdemeanor*, and be liable, &c. The Act is to be read as part of the Larceny Act.

The Act provides in terms for precisely such cases as the one before us, and taken in connection with the occasion of its being passed, is a very distinct recognition by the Imperial Legislature of the insufficiency of the law as it stood to reach such cases. It is true, there are amongst those things enumerated some which are described in terms capable of describing forgeries already punishable—*e. g.*, “wilfully and with intent to defraud alter any document or valuable security,” but whatever may be the decision when a question arises as to such acts being forgeries at common law or under other statutes, or only misdemeanors under this Act, it is impossible to suppose that conduct of the kind in question in *Saunders's Case*, whether it happened to be the making by a clerk, in the books kept by him of an entry which was false *ab initio*, or the falsification by altering one already made, could ever be now held in England to be forgery.

We have thus the entire current of English authority and English legislation, as I take it, against holding the act in discussion to be forgery.

On the other side no case had been cited to us, and as far as I am aware, none can be found, except the Pennsylvania case of *Biles v. Commonwealth*. The decision in that case undoubtedly was, that under facts essentially like those before us the crime of forgery had been committed. It will be necessary to examine the reasoning on which it proceeded. The case was argued on a writ of error before the Supreme Court of Pennsylvania. The judgment of that Court delivered by Read, J., affirmed that of Linnow, J., which had overruled a motion in arrest of judgment, but

added nothing to it by way of either argument or illustration. For the grounds of the decision it will therefore only be necessary to look at the judgment delivered in the Court of first instance. The first part of the judgment is occupied with the proof, derived from English as well as American authority, that forgery is not an offence which can be committed in respect of deeds alone, which some centuries ago was supposed to be the case, but that any writing may be forged. This is conclusively established. The dissertation concludes with the statement that "In *Barnum v. The State*, 15 Ohio R. 717, the fraudulent alteration of a book of account, with intent to defraud, was held to be a forgery," which, as I have pointed out, is a misreading of that case. At this point the judgment approaches the question of forgery as applied to the facts.

The point of view from which the question is to be discussed is thus presented by the learned Judge: "It is unnecessary to cite further authority in support of the position assumed, and we proceed to determine whether the erasure, or alteration, or making of the entry in question, was to the prejudice of the rights of any one person; or whether, if genuine, it would operate as the foundation of another's liability, or the evidence of his right." These tests are then applied, and upon them the case is decided. The question I have discussed as to the distinction between a false writing and one which only states what is false is never alluded to. The Court had not the assistance of the *dicta* in *Re Windsor* or in *Regina v. Ritson*, for those cases were far in the future, and the question seems not to have been suggested, or at all events not so distinctly as to be treated as a topic for discussion. Two points are made. The first is, that injury was done to the employers beyond the abstraction of their money. This is enforced in a passage of much eloquence, but, as I venture to think, of inconclusive reasoning. "The erasure, alteration, or making in question," it is said, "was part of the fraud perpetrated upon these prosecutors by the defendant. Without it, their rights might have been prejudiced,

but the mere breach of trust involved in the abstraction of the money would have been promptly detected. By this fraudulent act the injury was systematically planned, and so ingeniously carried into effect that no sooner is it discovered, than the prosecutors find themselves in a most embarrassing position." I pause here to say that I suspect some misprint in the last sentence. I do not understand what is alluded to, if it is intended, as here expressed, that by the falsification of the book an injury beyond the concealment of the theft was intended or planned. The design to embarrass, or the fact that embarrassment resulted, are not, as I understand, put as matters proved, for this was a motion in arrest of judgment only, and no evidence is set out, but as to what was the possible or probable effect. The judgment proceeds: "A single false entry in a set of mercantile books, discovered, tarnishes at once the most sterling credit, and being known by the community at large excites the most feverish anxiety. Not only is the right of the immediate victim prejudiced, but the rights of others are endangered, and thus, too frequently, a wide-spread ruin follows the first disaster." I read this graphic description of the consequences of the falsification for the purpose of contrasting the conclusion drawn from it with that which was arrived at in England when it was found that the law did not reach a case of the kind. "Nothing but the clearest indication of the legislative will," the learned Judge continues, "should deter us from declaring this evil to be within the reach of the remedy prescribed by the common law."

In England the Legislature applied the remedy, not of course by declaring *ex post facto* that Saunders was guilty of a crime, but by providing for future delinquencies. The reasoning of the American Judge is not applicable to alterations only, but applies equally to all false entries. No doubt they are all equally calculated to do the mischief he depicts; if there is any difference it is probably that the one which was always false is the more dangerous, as more likely when discovered (which is the case he puts) to



create suspicion of extensive and systematic falsification, than the one which, by reason of the erasure, is more easily detected. Every act of the sort deserves punishment, but the reasoning does not prove that it should be punished *as forgery*. The forger's intent is to defraud by skilfully avoiding discovery, the evils which may follow the discovery, though very serious, are remote from the intent.

The learned Judge further argues that the writing, if genuine, might have been evidence of the rights of the prosecutors, because the journal in which it was contained would, in a Court of Equity, be received in evidence for some collateral purposes. It is unnecessary to examine closely the force of this consideration, because it applies equally to all false entries, and touches after all only the question of intent to defraud, which is sufficiently shewn for the purpose of committal for trial in the case before us.

The other point made, and the one on which I think the decision may chiefly be said to turn, is, that the entry was in substance an acquittance or in the nature of a receipt from the firm to the defendant. This is the view taken of the decision by Mr. Justice Sargent in the Ohio case. Assuming the position to be made out that the entry was a receipt, that learned Judge considered it would be in accordance with the authorities. I think so too, but I am not convinced that the entry can be treated as a receipt.

Mr. Justice Ludlow's argument is this: "As confidential book-keeper, he receives the amount of the bills receivable; to discharge himself from liability, he enters the several items in the Journal, *as agent of the firm*; and then, not as agent of the firm, but as an individual and for his own wicked gain, so erases or alters or makes a figure or figures in the sum total, representing the addition of the entire entry as to deceive and thereby defraud his employers."

This argument is addressed to the *alteration, qua* alteration, of the original correct entry, as if the alteration or defacing of it, which might have been done by a blot or by tearing out the leaf, were the offence, rather than to the *forgery* of the false entry.

But it is a fallacy to treat the entry as a receipt in the sense of an acquittance or discharge. This is easily apprehended by supposing an action for money had and received brought by the employer against the clerk, and met by a receipt signed by the clerk himself as agent for his employer.

I have already adverted to the fact that the contention that such entries are receipts was ineffectually urged in *Re Windsor*.

How is it to be considered an acquittance of the clerk? If it imports that he has paid money over to his employer or otherwise discharged himself from the amount put down, it is only his own statement of that fact. He does not, on behalf of his principal, certify that he as agent has fulfilled his trust; he merely as the agent, or rather *being* the agent, informs his principal that the amount he sets down is what he received. But if the entry could be regarded as an acquittance of the clerk, he would not defraud his employer by putting down too small a sum.

Then, if not an acquittance, is it an accountable receipt? I understand an accountable receipt to be a voucher to a person by or on whose behalf money or securities or goods have been entrusted to another, that the amount has been received and is to be accounted for. The common bank book is a familiar example. A deposit receipt is only a more formal extension of the same kind of memorandum. I am not prepared to say that the entry in the bank ledger of the same deposit which is noted in the customer's pass-book, is also an accountable receipt, even though made in the ledger account opened with the customer; but to hold that the entry in the general cash book of the bank is a receipt of that character would, in my judgment, be unwarranted by either principle or authority.

The entry is, no doubt, a voucher that the clerk received the money, upon which his employer can call him to account; but if incorrect, or even fraudulently incorrect it is, as put by the English Judges, only a false statement or a written lie, and not a forgery.

It seems to me impossible to regard this Pennsylvanian case as a satisfactory decision, or one which could be followed in the administration of our criminal law without introducing confusion and uncertainty, and in fact assuming, on the part of the Courts, functions which belong only to the Legislature.

Since writing the remarks which I have now read, I have had an opportunity of seeing a copy of the judgment delivered by Mr. Justice Osler when the prisoner was before him. I believe my views of the law are in entire accord with those expressed by that learned Judge ; but he considered, though not without hesitation, that this case might be distinguished from *Re Windsor*, by the circumstance that the book containing the entry now in question is the book of the comptroller, and the accounts are the comptroller's accounts with the city ; while in *Windsor's Case*, the book, although it was the property of the bank, contained the accounts between the defaulting teller himself and the bank. I had not failed to consider this position, and some of my remarks were suggested by it. One of these was the reference I made to the deposition of the comptroller himself. But if I had been aware that the decision of the learned Judge had turned upon it, I should have felt it due to him, although the present appeal is not directly from his judgment, to have explained more distinctly why I held a different opinion from that on which he acted.

Assuming the prisoner to have been the comptroller's clerk, the position, as between him and the comptroller, was precisely that which existed between Windsor and the bank in which he was teller. We can scarcely say, from the very meagre information we have, what was the precise relation between the prisoner and, on the one hand, the comptroller, and on the other, the city. The comptroller says the prisoner was chief clerk and cashier in his office. Mr. Abeel described him as chief clerk in the office of the mayor and common council, and being in charge of the cash book of the comptroller, being one of

the account books of the city. Whether he was servant of the city or of the comptroller, or to whom he was responsible we cannot say. We do not know that the comptroller was responsible for the honesty of the prisoner's dealings or the accuracy of his accounts. One of his duties, the comptroller tells us, was to receive all moneys paid into the office, and to pay them over to the treasurer. There is nothing before us to shew that in this branch of his duty he was not under direct responsibility to the city. Mr. Abeel's description of him would indicate that he was so, while an inference to the contrary might be drawn from the treasurer's receipts, which acknowledge the receipt of the money from Mr. Baker, the comptroller. But whatever may be the correct understanding in this particular, the question of forgery or no forgery is, in my opinion, the same. If the prisoner's responsibility was directly to the city, or in other words, if what he did was as the servant of the city, we have again the precise facts of *Windsor's Case*. We only find it possible to argue that a distinction exists by assuming that he dealt with the city, or with the treasurer on behalf of the city, in the name and place of the comptroller. But, if we make this assumption, it must be in connection with the undisputed facts, or the facts proved to us, which are those only with which we have to deal. These facts are that the treasurer and every one concerned knew that whatever was done was done by the prisoner. The act itself was his, and was well known to be his, even though done only as agent for another. That follows from the whole evidence, but most expressly from that given by the comptroller, when he tells us that the payment over of the money was the personal duty of the prisoner—payment, that is, not to the comptroller but to the treasurer. The representation conveyed by the entries was not, "the comptroller certifies that he has received so much money and no more;" but it was, "*I* certify," or "the comptroller certifies *by me as his clerk* that he has received," &c. Even this puts it perhaps too strongly, because, taking the knowledge we have of the duties of the

prisoner ; and assuming, as we are bound to assume, that the treasurer knew just what the comptroller has told us of them ; and further, bearing in mind that, apart from the question of *duty*, the treasurer knew, as a fact, that the person who conducted the whole transaction was the prisoner ; the statement, in effect, would be, "*I, William A. Hall, certify on behalf of the comptroller, that I, as his clerk, have received, &c.*"

In no aspect of the evidence does it strike me that the prisoner can be taken to have put forward the entries in the book as the act of any one but himself. The responsibility of the comptroller for them, if it existed, is a very different matter. We are not dealing with civil responsibility, but with the criminal offence of forgery ; and this further discussion thus brings us again to the former conclusion. Whether the prisoner is to be taken to certify that he himself received the money set down in the book. or that the comptroller received it, it is *his* statement, and is known so to be. It is therefore governed by the rule acted upon in *Re Windsor*, and although fraudulently false, is not forgery.

In my opinion we should, in pursuance of the ninth section of the R. S. O. ch. 70, under which we hear this appeal, certify to the keeper of the common gaol of the county of York, who has the custody of the prisoner, that his confinement is illegal, and order his immediate discharge.

GALT, J.—In my opinion this appeal must be dismissed. The facts of the case are very simple. The accused was chief clerk and cashier in the office of the comptroller of the city of Newark, and it was his duty to receive, enter, and pay over to that officer all taxes received by him. The books in the department, so far as we are concerned, were two, one called "Real Estate Arrears," the other "Cash Book." There is a warrant from a Justice of the Peace attached to the former, directing the officer therein named to collect the taxes set forth therein. At page 41

there are five items, being Nos. 1233 to 1237, which together amount to \$562.32, which sum is made up as follows: Tax \$482.54, costs \$7.70, interest \$72.08, \$562.32. On the 18th March, 1881, the Newark Savings Institute sent a cheque to the comptroller for a sum of upwards of \$4000, which included this amount, and which was handed into the office on that day and was duly paid. The prisoner, whose duty it was to receive and enter the payment, did receive and enter it as follows: \$7.70, \$72.08, \$282.54: total \$362.32; the charge against him is that he originally entered the true sum received by him, viz., \$562.32, and afterwards for a fraudulent purpose, changed the figure "5" to "3." We are not called upon to say whether he did or did not do this, but only whether the evidence is sufficient to put him upon his trial, and of that there can be no doubt; but the question is, supposing him to be guilty, is the crime forgery. I think it is; it is the alteration of a writing with intent to defraud. There was a false entry as respects the "tax" received being \$282.54 instead of \$482.54, and such would not render the prisoner liable for the crime of forgery, but there is also the alteration of a true entry, which is a forgery. It is to be observed that the book in which the change was made is not a private account book kept by the prisoner as clerk of the comptroller, but is the public record kept by the latter as between himself and the treasurer, and was moreover submitted each day to the latter as an evidence of the money received, and is by him receipted on the same day, and no doubt it was his duty to satisfy himself by an examination of the items whether or not the amount paid to him by the comptroller is really the sum which should be paid.

If then the prisoner, when he received the cheque for the \$562.32 entered it correctly, and subsequently during the same day wrongfully appropriated to his own use another sum of money, and, for the purpose of concealing such embezzlement, fraudulently changed what had been and was a true entry he came clearly within the definition of forgery, as laid down in Harris's work on Criminal Law

p. 249: "Forgery may be described in general terms as the false making (or altering) of an instrument (or part thereof) which purports on the face of it to be good and valid for the purpose for which it was created, with a design to defraud." The account in question purports on the face of it to be a true account of all the moneys received on 18th March, 1881, and as originally made it was so, and the prisoner with a design to defraud afterwards altered it by changing the sum of \$562.32 to \$362.32. This therefore was not the case of a false entry but the fraudulent alteration of a true one and consequently forgery under the above definition.

The Court being equally divided, the appeal was dismissed, and the order appealed from stood affirmed.

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## IN RE PHIPPS—EXTRADITION CASE.

*Extradition—Forgery—Rejection of evidence.*

P. was the superintendent of the Blocksley Almshouse, situated in and supported by the city of Philadelphia, U. S. Parties supplying provisions, &c., for the use of the charity were paid by warrants duly prepared and signed by the proper officers thereof. Three such warrants for the payment of certain persons or firms were in the hands of W., the Secretary of the almshouse, to be delivered to them on their respectively signing the stub or counterfoil of the warrants. P., who was well known to the secretary, applied to him for those warrants, stating that he had authority from the several parties to sign for them, which he did accordingly, and W. handed over to him the warrants, which were subsequently cashed at the office of the city treasurer.

P. having fled to this Province, an application was made for his extradition before the Judge of the County Court of Wentworth, when expert evidence was adduced proving that according to the Statute Law of Pennsylvania, as also at Common Law as there interpreted, these facts constituted the crime of forgery:

*Held*, on appeal, *per* SPRAGGE, C. J. O., and PATTERSON, J. A. [affirming the judgment of the Queen's Bench Div. 1 O. R. 586], that the act amounted to the crime of forgery, and so rendered P. liable to be extradited:

*Per* BURTON, J. A., and FERGUSON, J., that in the absence of any suspicion of any complicity of W. in the fraud, the facts would not have made out the crime of forgery; but as the evidence afforded ground to infer that W. and P. were in collusion, and had combined together for the purpose of committing the fraud by means of the false documents, and was therefore sufficient to warrant the committal of P. for the crime of forgery at common law, the order for his committal for extradition should be affirmed.

*Per* SPRAGGE, C. J. O.—The forgery which is the subject of the treaty, cannot be confined to the statutory felony of forgery.

*Per* PATTERSON, J. A.—Remarks upon the general right of a person charged before a Magistrate with an indictable offence to call witnesses for his defence, and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime: *Semble*, that the evidence here offered, as stated below, was not improperly rejected.

THIS was an appeal from a judgment of the Queen's Bench Division, reported in 1 O. R. 586; where the facts and circumstances are so fully stated as to render any repetition of them unnecessary.

The appeal came on to be argued on the 7th of February, 1883.\*

\* *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, J. J. A. and FERGUSON, J.



*McCarthy*, Q.C., *Osler*, Q.C., and *Carscallen*, for the appeal.

*E. Martin*, Q.C., and *Fenton*, contra.

The points relied on and cases cited appear in the report in the Court below and in the judgment.

March 6, 1883. SPRAGGE, C. J. O.—The Blocksley Alms House is a charitable institution, in the city of Philadelphia, supported wholly or in part by funds furnished by the city. The prisoner, on the 27th of March, 1882, was superintendent of the institution; one Robert J. Williamson was secretary, and had charge of the account-books. Supplies for the use of the institution were furnished by, among others, Seeds & Ferguson, Walter J. Burrows, and A. J. Bellows & Co. It was the practice of the institution to issue warrants for the payment of supplies furnished, payable to a party furnishing supplies, *or bearer*. These warrants were kept in books, were in fact the leaves of books, which were kept by Williamson. It will be sufficient to refer to the three warrants in question and their condition on the 27th of March. They were respectively filled in with the names of the above parties, and with the amount due to each; and were signed by the president of the board of guardians, and by the secretary, and countersigned by the city Comptroller; and were thus in a condition to be issued to the parties entitled to payment, upon vouchers being given by them for such payment. The vouchers were in the same book, and consisted of counterfoils, or stubs, containing a date, the amount of the warrant, its number, the name of the person or firm entitled to the warrant, and underneath the words, "Received above warrant." These receipts were, so is the evidence, signed with the names of the above firms and parties respectively by the prisoner, and thereupon warrants for payment were delivered to him as they would have been delivered to the parties themselves, if they had themselves signed the receipts.

It is in evidence that the prisoner had no authority

from these parties, or from any of them, to sign their names to these receipts, or to obtain these warrants, or to receive the moneys payable under them

I have stated it as one of the facts in the case that the prisoner signed. I will presently notice the evidence upon that point.

If the case rested there, assuming for the present the evidence of the signing of the receipts by the prisoner to be sufficient, it would be a plain unequivocal act of forgery. It would be clearly within the definitions which have been so often referred to. Upon this I may refer without repeating them to the definitions given in the judgment lately delivered in this Court, in the Hall Extradition case, (*ante* p. 31). The intent to defraud is very clear; and that what was done was to the prejudice of the rights of others, is also clear. These warrants, as appears upon evidence, passed, current as money; and being payable to bearer, and being authenticated by the signatures of the proper officers of the municipality, the municipality would be liable to pay them. What was done was also to the prejudice of Seeds & Ferguson and the others into whose hands these warrants ought to have gone, inasmuch as, as is shewn by the evidence, they experienced delays and difficulties in obtaining payment for the supplies furnished by them. The ultimate loss would, as a matter of course, fall upon the municipality with probably a remedy over against Williamson.

The case would thus, I apprehend, be quite clear, but for a piece of evidence contained in the deposition of Williamson, the secretary of the institution, to the effect that the prisoner when he signed the receipts assured him that he had the authority of Seeds & Ferguson and the other parties to do so. Taking this for the present to be true, what it shews is that Williamson, who was the custodian of the book containing these warrants, knew that the signatures to the receipts were not those of the parties entitled, but of the prisoner, the prisoner asserting authority to do what he did, and was therefore not deceived in regard to the fact of signature.

Whatever effect that circumstance might have had, if Williamson had been the only person whose rights would be or might be prejudiced by the act of the prisoner, I cannot see how this representation can alter the character of the act, when the act itself was to the prejudice of third parties. It would amount only to this, that one of several persons whose interest would be prejudiced by this act of the prisoner, knew that the signatures affixed to the receipts were not what they purported to be. As to the others, all the elements necessary to constitute forgery remained; and that being so, I cannot see how the knowledge of Williamson can divest the act of the prisoner of the criminal character which it would otherwise have.

It is this prejudice to the rights of others that chiefly distinguishes this case from *Regina v. White*, 2 C. & K. 404. But I think it by no means clear, if Williamson had been the only person prejudiced by these acts of the prisoner, that the offence would not have been forgery. We are not informed by the report of the case upon what grounds the act of White was held not to amount to forgery. We can only gather the opinions of the Judges (apart from the general conclusion at which they arrived) from their observations and questions to counsel during the argument. From these I should rather infer that if the prisoner White had signed the name of Thomas Tomlinson the holder of the bill without more, except saying that he had the authority of Tomlinson to do so, it would have been the opinion of some of the Judges, it may be of all of them, that the act was forgery. Wilde, C. J., observes to counsel "You say that this indorsement was all that it purported to be." The answer of the prisoner's counsel is, "The signature was the prisoner's own writing *and it purports to be so.*" Parke, B., quotes this observation from a judgment of Mr. Justice Littledale, "I take it, to forge a receipt for money is writing the name of the person for whom it is received. But, in this case the acts done by the prisoner were receiving for another person, and signing *his own name.*" Pollock, C. B., puts this case, "Suppose

that the person whose indorsement was put on the bill had really nominated an attorney to indorse bills for him, and the forger had signed the name of the attorney, would that be forgery." The prisoner's counsel answers, "I think it would." Parke, B., puts another question, "If the prisoner had said, 'I am authorized by Mr. Tomlinson to write his name,' and had written it in the presence of the banker, how would that be?" The answer of counsel is, "I should submit no forgery." The last question put was this case, except as to the persons other than the one prejudiced by the fraud, and serves to indicate the inclination of the mind of the learned Baron, as to how the law would be in the case that he puts. I make these extracts from the case, however, not to shew that if the case before the Court had been like this case the Court would have held the act of White to be forgery; but to get at the *ratio decidendi* so far as the very meagre report of the case enables us to do so; and that I take to be that White's signature was, what upon its face it purported to be, the signing by himself of his own name.

White's case, therefore, is to my mind distinguishable from this case upon that ground; and also upon the ground that in *White's Case* the intent was to defraud the banker, and him only; for he was the only person who could be defrauded thereby. The act could be to the prejudice of no others; and he, the only person prejudiced by the act, trusted to the false pretence of White, that he had the authority of Tomlinson; and there was nothing beyond that false pretence; for the signature was what it purported to be, his own.

I have so far assumed that the prisoner did make the representation to Williamson that Williamson says he did; but it would be a question of fact for the jury whether he did make that representation. The prisoner does not himself put it forth as a fact that he did so. His position, taken by his counsel in his presence, and it is to be presumed upon his instruction, before the Judge of the County Court at Hamilton, and reiterated by his counsel

before us upon this appeal, is, that the signatures to the receipts are not his signatures; and that the mental condition of Williamson is such that his evidence should not be taken as establishing the fact. That is a plain intelligible issue, and one proper for a jury, but this position of the prisoner, if not absolutely inconsistent with the fact that he made the representation attributed to him by Williamson, is itself a fact proper to be taken into account by the jury, upon the question whether he did make such representation or not.

It may be said that Williamson is the only witness who deposes directly to the fact of the signatures to the receipts being made by the hand of the prisoner; and that if we discard his evidence as to the prisoner's representation, we must discard his evidence altogether. I do not think so. We may, as a jury may, believe parts of a man's evidence and disbelieve other parts. We may disbelieve what a man says in exculpation of himself, in his account of a wrong or impropriety committed by himself and another, and yet believe his account of the wrong committed: and of that character is what Williamson says as to the prisoner's representation. This case may be put. Seeds & Ferguson might have complained to the board of guardians that Williamson had allowed their warrant to get into the hands of Phipps; and Williamson upon being interrogated by the board might have said by way of excuse that Phipps had told him that he was authorized by the firm to receive it, and to sign their name to a receipt for it. The board might, with or without an inspection of the receipt, believe Williamson's assertion that Phipps had signed it, and disbelieve his excuse. So if Phipps had been arrested in his own country, and put upon his trial there, and Williamson had been a witness testifying to the fact of Phipps's signature to these receipts and adding that he allowed Phipps to sign and to have the warrants upon the representation that he has deposed to in these proceedings, the jury might regard what he said as to Phipps's representations as put forward to excuse

himself and might discredit it, and yet give credit to his evidence of the fact of the receipt being signed by Phipps. It is a question proper for a jury who might credit the whole or none of the witness's testimony, or credit parts of it and discredit the rest.

It is unnecessary to say what would be the proper course for a magistrate, or for the Courts of this country, holding that if the alleged representations were made the act of the prisoner would not be forgery, if the evidence of Williamson were the only evidence of the fact of the signatures to the receipts having been made by the prisoner. We have before us other evidence. We have the evidence of William S. Janney, who describes himself as the coroner of the city of Philadelphia, and the bail of the prisoner upon this charge. He swears that he is acquainted with the handwriting of the prisoner; that he has examined the receipts in question, and that the signatures thereto are in the handwriting of the prisoner, adding: "All which I believe to be true;"—a formula at the foot of all the depositions: and, I may be allowed to observe in passing, by no means a good formula, inasmuch as it does not distinguish, (as affidavits and depositions sworn here are required to do,) between what the deponent states positively and what he states from information or belief, with his reasons for both. We have also before us the evidence of John Huggard, the president of the board of guardians. He swears that he has examined the receipts in question, and in particular the signatures thereto; and that these signatures are in the handwriting of the prisoner. The usual formula is added to his deposition. As to his means of knowledge, he says that he is familiar with the handwriting of the prisoner, and has seen it frequently; and from the relative positions of himself and the prisoner he would probably have had very many opportunities of seeing it. He says of the prisoner's office and duties, that he, the prisoner, was for several years prior, and up to the 1st of September, 1882, the superintendent of the almshouse, appointed by the board of guardians, and as such

had charge of it, and received the accounts from all persons furnishing to the same, materials or supplies; and had the authority to approve or reject such accounts, and when approved to present the same to the board; so that warrants or orders might be drawn on the city treasurer for payment of the same. I judge from this that the deponent, as chairman of the board, must have seen the prisoner's handwriting very frequently; and no one probably would be more competent than himself to speak to it. We have before us the book containing the signatures in question. Each appears to my eye unlike the other; but I am unable to say that the practised eye of the president of the board, accustomed for several years to the handwriting of the superintendent, may not see in each of these signatures that which to him is convincing evidence that they are in the handwriting of the prisoner, and I cannot take upon myself to say that he is wrong in that conclusion.

The depositions before us contain evidence also of conduct on the part of the prisoner, from which presumptions, more or less probable or slight, may arise. We may properly consider what would probably have been the conduct of the prisoner under the circumstances detailed in the evidence of Bellows, and in that of William Murphy, if he had been innocent of this charge, and what his conduct if guilty. This conduct may aid us to form a judgment upon the fact of guilt or innocence; for, as put by Mr. Best, in his book on presumptions in criminal cases, (p. 3,) adopting the language of Locke: "The foundation of judgment is *probability*, or the likelihood of a proposition or fact being true or false, deduced from its conformity or repugnancy to our general knowledge, observation and experience."

We have these facts to start from. The warrants to which Seeds & Ferguson and the other parties were entitled had been issued on the 27th March, 1882, to some person or persons other than the parties entitled; there were signatures to the receipts for these warrants purporting to be the signatures of the parties entitled, which were not in fact their signatures. They must then have been



written by some other hand or hands. The *corpus delicti* therefore is established. The prisoner in his capacity of superintendent had passed these parties' accounts on or before the 27th of March. In the latter part of August Andrew J. Bellows, one of the parties entitled, asks the prisoner about the warrant, to which the firm was entitled; his answer that he had had so many things to attend to that he had not come yet to the account of their firm, was simply untrue; and he must have known it. It was such an evasion as a man would probably have made who had himself obtained the warrant, (and he could have obtained it only by the means charged against him); while if innocent his answer would have been wholly different.

What is deposed to by William Murphy, the father of one of the parties entitled, is still more suggestive of wrong, and of a consciousness of wrong on the part of the prisoner. The deponent, after applying on behalf of his son some five or six times at the office of Williamson, and having found, as he says, that the warrant for his son had been issued and paid, called by the direction of Williamson upon the prisoner, and demanded his son's money. After repeated promises of payment by the prisoner, he told him about August that he would pay the money out of his own warrant for salary; and he made no other reply—and made no denial when told by Murphy that he, Murphy, knew that the warrant had already been issued and paid. The money still remaining unpaid, Murphy threatened him with a suit, and he then paid the money; and when paying it asked for a receipt and for an order for the warrant upon the secretary, and that the *date of the order should be left blank*, and this was done.

I do not say that what passed between the prisoner and Bellows, and between the prisoner and William Murphy, is absolutely inconsistent with innocence on his part; but I feel warranted in saying that in my judgment the probability is, that a man saying what the prisoner said to these parties, and dealing with them as he did, was guilty of wrong in the matter of these warrants. It was all



quite consistent with his having obtained these warrants by signing the names that we find appended to these receipts,—scarcely consistent with any other hypothesis, unless possibly that Williamson signed them; and the probabilities are against that idea.

The presumption from conduct, looking at the facts that are indisputable, is, that the signatures are the prisoner's; and I do not think the presumption is a slight one; but if it were, the facts upon which it is founded would still be evidence; for, to quote again from Mr. Best (p. 41) "Although presumptions of this kind (slight presumptions) are not entitled to any weight when standing alone, still they not only form important links in a chain of evidence and frequently render complete a body of proof which would otherwise be imperfect; but the concurrence of a large number of them may (each contributing its individual share of probability) not only shift the *onus probandi*, but amount to proof of the most convincing kind, even in capital cases." It is, however, unnecessary, in this case, to go further than this; that the facts are admissible, as the basis of a presumption more or less strong of the guilt of the prisoner. I abstain carefully from pressing them unduly against him; but still must observe that the conduct to which I have referred on the part of the prisoner can scarcely be attributed to forgetfulness, or to a good natured desire on his part to repair a wrong occasioned by his neglect. So, at least, it strikes me upon the whole of the evidence. It will be the proper function of a jury to give their due weight to these circumstances; and to any explanation, and to any counter evidence that may be offered in relation to them.

Shortly then, my opinion is, that upon the evidence before us the offence as described in the evidence of Williamson is forgery by our law.

But I am not satisfied that the learned Judge of the County Court was right in refusing to receive expert evidence tendered by the prisoner of the law in the State of Pennsylvania, upon the facts as they appear upon the evi-

dence of Williamson; and therefore it is that I have discussed at some length the question of how the evidence of Williamson may be dealt with and whether there is sufficient evidence for the rendition of the prisoner without the evidence of Williamson. There is certainly room for argument that what Williamson has said as to the representation made by the prisoner, when, as he says, he signed the receipts, was said in his own excuse without any foundation in fact. His answer to William Murphy, when asked by him for his son's warrant, that there was no warrant for him or his son, looks like it. The natural answer, if there had been such a representation as is now deposed to, would have been that the warrant that he asked for had been already delivered to his son's agent Mr. Phipps, and the answer that he did give was reiterated several times. This may admit of explanation, but the inference without explanation is, that he had allowed Phipps to sign the receipt and have the warrants without any such representation. Upon the whole, my opinion is that the evidence is such as would be sufficient and proper for the commitment of a prisoner for trial; and, therefore, proper for the remand of this prisoner for extradition.

I have not gone into the question of the admissibility of the evidence. The decision in *Regina v. Brown*, 6 A.R. 386, covers most of the ground taken by the prisoner's counsel in this case, and I concur with my brother Patterson in what he says in this case upon the point.

I have to add, that I am unable to agree with the opinion expressed by Mr. Justice Cameron, that the forgery which is the subject of the treaty and the statute, is confined to the "statutory felony of forgery." Nothing is more improbable than that the high contracting parties to the treaty could have intended so to limit the meaning of the terms used by them "Forgery, or the utterance of forged paper." It has always been a matter of policy between the two countries that neither of them should be an asylum for persons guilty of that crime; and as long ago as the year 1794, when the treaty known as Jay's treaty was

concluded between the two countries, in which only two crimes were specified as extraditable offences, murder being one, the other was forgery.

There is nothing in the treaty of 1842, or in the statutes passed to carry it out, that I have seen, that indicates any such intention, or that limits the meaning of the term to one description of forgery ; or, to speak more accurately, to forgery which has been made felony by Act of Parliament. My learned brother refers to a phrase used by Sir Alexander Cockburn, in the case of *In re Windsor*, 6 B. & S. 522. The learned Chief Justice, in that case, says that "the true construction of this statute is, that its terms, specifying the offences for which persons may be given up, must be understood to apply to offences which have some common element in the legislation of both countries."

My learned brother must have understood the Chief Justice as emphasizing the word "legislation," for in the printed copy of his judgment in this case, he italicises the word ; but with great deference, I cannot but think that the learned Chief Justice intended to lay no stress upon that word. He was drawing a distinction between an offence which was made forgery, "only by an Act of the local Legislature of New York," and that which was forgery by the general law of both countries ; and he uses the term "general law," in again making the same distinction, thus : "Where a part only of one of the two nations thinks proper to make certain acts an offence which do not fall within that offence as known to the general law of both, it will not be sufficient to bring a case within the statute." What the learned Chief Justice emphasized was, the general law (to use his own expression,) as distinguished from the local law of one State. I do not understand him to have emphasized the word legislation. All that we can say is, that he is reported to have used it.

But if he had used the word advisedly, which I doubt, it would not, in my opinion, used in the connection that it was, and being as it was, beside the real question in the case, be an authority for holding that the treaty and the

statutes applied only to such forgery as is made or declared to be felony by statute.

BURTON, J. A.—We have no official notice of the suspension of the Imperial Act of 1870, although it was stated on the argument that an order in council had been passed to that effect; but as these proceedings were taken long previously, they cannot in any way be affected by that suspension, and it may be necessary, in view of some of the objections which have been taken, to consider to what extent that Act does or did apply to extradition proceedings in this province.

Sec. 2 provides that where an arrangement has been made with any foreign State, with respect to the surrender to such State of any fugitive criminal, Her Majesty may, by order in council, direct that this Act shall apply in the case of such foreign State.

Sec. 3 declares that certain restrictions shall be observed with respect to the surrender of fugitive criminals.

Sec. 4. That no such order shall be made unless it is in conformity with those restrictions.

The United States Government having declined to submit to these restrictions, no order in Council has ever been passed applying it to the treaty between Great Britain and her dependencies and the United States, so that no portion of the Act would apply to Canada, but for the 27th section; and that section being modelled somewhat upon the plan which has caused so much trouble and confusion in Canada, by a general declaration that all acts and parts of Acts inconsistent with the Act then being enacted are thereby repealed, is perhaps not free from difficulty in its construction.

It commences with a declaration that the Acts specified in the schedule, which includes the Imperial Act 6 & 7 Vict. ch 76, being the Act to give effect to the Ashburton treaty, are repealed, and then enacts that the Act of 1870 (with the exception of anything contained in it which is inconsistent with that treaty) shall apply in the

case of the United States in the same manner as if the order in council above referred to had been made, and as if such order had directed that every law and ordinance in force in any British possession with respect to such treaty should have effect as part of the Act of 1870.

One of the Counsel for the prosecution referred to the 17th section as shewing that the Act of 1870 was in full force in this Province, either overlooking the fact that it contains a declaration that the Act shall only extend to the colony when applied by order in council, or forgetting that such order in council never had in fact been passed.

As pointed out, in *Regina v. Brown*, 3 A. R. 386, the Dominion Act 31 Vict. ch. 94, and such parts of the Act of 1870 as are not inconsistent with the Treaty, are to be read together; but it would be equally inconsistent, in my view, to extend the list of extradition crimes to crimes, though designated in the same form of words as in the treaty, which have become such by legislation subsequently to its date, as it would be to extend it to crimes now for the first time made extradition crimes in the list appended to that Act. It is not important as regards the crime with which the accused in this case is charged, as, if an extradition crime at all, it was so also at the time of the treaty, but I merely wish to point out that only those portions of the Act at that time applied to Canada which were not inconsistent with the treaty of 1842.

Clearly those portions which relate to the evidence and depositions to be used on the proceeding do apply, and the first point is whether any of these depositions are free from the objections taken, and if so whether they contain, with the oral testimony taken before the County Judge, sufficient *prima facie* evidence of guilt to justify the commitment.

Whatever may be said as to the sufficiency of the depositions first produced, it was very faintly argued by Mr. McCarthy that the B series of depositions were not properly certified and receivable, if secs. 14 and 15 of the Imperial Act of 1870 were in force at the time they

were offered and received in evidence. Whilst of opinion that the greatest strictness is and ought to be required to establish the offence for which the accused is confined, and that it ought to be established beyond all reasonable doubt that he has been guilty, not merely of a criminal offence, but of an offence that renders him liable to be extradited under the treaty, I fully agree that that being once made out upon the depositions or other evidence, we ought not to be astute in finding flaws in the forms or procedure, of a purely technical or formal character, but should construe the provisions of the Acts in those respects with reasonable liberality.

But I desire not to be supposed to assent to the views expressed by some of the members of this Court, as to what constitutes the crime of forgery. I do not agree in the view that this case is in substance distinguishable from *Regina v. White*, because the prisoner there declared upon the face of the document that he signed *per. proc.* It is not of the slightest significance as regards the offence now before us whether the accused signed the name of the persons whose authority he assumed to have in their names simply, or with the addition of his own name as their agent; in the one case he made the representation in writing, in the other verbally, but in neither case did he assume to pass off the signature to the receipt as the signature of the person giving it, which is the very essence of forgery. The person from whom he obtained the cheque was, if Williamson is to be believed, deceived by his representation; but it is to my mind impossible to hold that the writing the signature was forgery when the party defrauded knew perfectly that the person writing it was not the party designated in the receipt, that the act consisted not in any simulation or imitation of the signatures of the parties entitled to the cheques, but in the false assertion that he had authority to sign the receipts when in fact he had no such authority. With all deference, I think the remarks of the Judges in *Regina v. White*, give very slight, if any, countenance to the view that the decision would have been

different had the prisoner there, after representing that he had authority, signed the name of Tomlinson alone.

The Counsel for the prisoner in that case commenced his argument with this admission: "What I must take to have been proved is that the prisoner, with intent to defraud, and without any authority from Tomlinson to indorse this bill, *wrote by the hand of the banker the words 'Per procuration Thomas Tomlinson,'* and wrote with his own hand his own name." He did not attempt to put the prisoner's case upon the ground that he had signed only his own name; the very nature of the transaction required the indorsement of Tomlinson, and the act of the prisoner was to sign that name, adding that he did it by procuration.

There can be no doubt that in the case put by Pollock, C. B., and referred to by the learned Chief Justice, the party would have been guilty of forgery because he would have passed off a false signature as the signature of the true attorney, a case of forgery pure and simple; but the next question by Baron Parke: "If the prisoner had said I am authorized by Mr. Tomlinson to write his name, and had written it in the presence of the banker, how would that be"? and was properly answered by Counsel, "that would not be forgery."

It is a mistake to suppose, as was suggested, that in *White's Case* the intent charged was to defraud the banker and him only. There were counts in the indictment charging the intent to defraud every one who could by possibility be defrauded. I use the term defrauded designedly in place of prejudiced, as I assume it to be clear law that an indictment charging the offence in that form would be bad on demurrer, but the intent extended to everyone who could be prejudiced as I understand the term in such a connection, and the case, therefore, is in no sense distinguishable from this, except upon the fine spun, and, to my mind, untenable distinction, that he signed the names of his assumed principals without adding that he did so under a power of attorney, or *per proc.*

I can well understand that, in the case of negotiable instruments, there may possibly be a distinction drawn between a signature *per proc.*, and one without that addition. In the first case every party taking the bill would take it with notice that it did not profess to be the genuine instrument of the party making it, but to have been signed by some one having authority to sign it. If, however, the person assuming to have authority signed in the name of his assumed principal, although the person knowingly taking it could not be deceived, that would not necessarily be the case with a party negotiating it, who might rely upon it as a genuine signature, and the ordinary rule would then apply, that every thing which was the natural consequence of the act must be held to be the intention of the party signing the name to the bill, and therefore that he intended to defraud any one who might advance money upon it.

There is I think no new principle involved in the decision in *Regina v. White*. A forged instrument, as I pointed out in the case of *Hall*, (*ante* p. 31,) is one that is counterfeit not genuine, is one by which some one by the imitation of another's signature and by means of such imitation has endeavoured to cheat and defraud, and not the doing of something in the name of another which does not profess to be that other's personal act, but which the person doing it represents he has the authority to do as the act of the other; and I need only refer to the able judgment which I quoted in that case of Judge Sargent, of the Supreme Court of the State of New Hampshire, for a very clear exposition of this distinction.

In the case of *Commonwealth v. Baldwin* referred to in the judgment of *The State v. Wilson*, 15 West. Jur. 424, a copy of which was handed in since the argument, the note the forgery of which was alleged was signed by the accused in the name of a firm, Schouler, Baldwin & Co. of which he represented himself to be a partner, but it was held, and to my mind most properly held to be no forgery, nor do I think that the opinion expressed



in that case necessarily questioned the correctness of the decision of *Regina v. Ritson*, L.R.1 C.C.R.203. The case referred to in Coke had reference to a feoffment which took effect, not by the charter of feoffment alone, but by livery of seisin, and the date therefore might be immaterial.

If the act then, under the circumstances detailed by Williamson, was not forgery, it cannot become so because some other persons were or might be defrauded; the offence would be a misdemeanor under the Pennsylvania Statute to which we were referred, and the indictment was properly framed in order to secure a conviction under that statute.

I do not understand the learned Chief Justice of this Court when he speaks "of the prejudice to the right of another being all that is required to complete the offence," to mean that it is not necessary still to allege and prove that the document forged was so forged with intent to defraud. There can be no question that it is essential in every prosecution for forgery so to allege and prove the intent, although the prisoner's intent may be presumed if the consequences of his act would necessarily or possibly be to defraud any person; but the intent to defraud must be to defraud by means of the false writing; if there is no false writing, the intent to defraud cannot make it forgery. The intent is wholly immaterial on an indictment for forgery unless it is an intent to defraud by the forgery or the uttering of the forgery; and as there may be an intent to defraud by a false representation as well as by putting off the signature of one man as the act of another, and as it is shewn, if the evidence of Williamson is believed, that the fraud in the present case was effected by the former and not by the latter, the whole fabric falls with it.

I am still assuming that we are dealing with the case presented by the prosecution, and that the fraud committed as sworn to by Williamson is believed. On that assumption, how can it be said that any one was deceived or defrauded by the signing of a false document? The Alms-house authorities were defrauded, it is true, by the false representation, but it is out of the question to say that

they were deceived or defrauded by the signing of the receipt, as I understand the law ; it was by reason of false representation that they were defrauded or prejudiced in their rights ; the document Phipps signed was not a false document, and so whether they were defrauded or not it is not forgery.

Seeds & Ferguson may have suffered detriment and may have been subjected to risk and inconvenience, but not by means of a "false document." It is a begging of the question to say that if Williamson were dead they might not be able to shew the fact, and their claim might therefore be in jeopardy ; that is one of the risks to which all the transactions of life are subject, and cannot make that forgery which if the real facts were shown is not forgery. It is idle to say that Seeds & Ferguson could be deceived by the writing, and as it is shewn that it was not passed off as their signature, they could not be defrauded or run the risk of being defrauded by the writing ; the fraud upon them having been perfected and complete on the cheque to which they were entitled being given up on the false representation.

On the ground, therefore, that there was no "false document" in the present case, and that the intent to defraud is shewn not to have been by means of the writing, I should have no hesitation on this branch of the case in agreeing with Mr. Justice Cameron, who has had perhaps more experience in criminal law than any Judge on the bench, that the offence here charged was not forgery.

It remains to consider whether, if Williamson's evidence is not believed, in any view of the evidence the County Court Judge was authorized in committing the prisoner for extradition, under the statute, which provides that he may do so upon such evidence as according to the laws of the Province would justify the apprehension and committal for trial of the person accused if the crime of which he is accused had been committed in this province.

My brother Patterson, in the judgment which he has prepared, states it as his opinion that if Williamson's

knowledge that the names were written by Phipps deprived the transaction of the character of a criminal act of forgery, it must be equally so whether he was deceived by Phipps or acting in collusion with him. In that I agree, subject only to this qualification, that if it could properly be inferred from the evidence that Williamson was a *particeps criminis* in the actual offence of passing off upon the authorities as genuine the signatures of these parties, the Judge would have been authorized in committing, and it would not be for us as an Appellate Court to weigh too nicely how far he was justified in arriving at that conclusion.

I agree with my learned brother in placing but little reliance on the opinions of the chairman of the board of guardians and Mr. Janney. Still they were evidence from which the Judge, discarding the evidence of Williamson as untrustworthy, might come to the conclusion that the signatures were in the prisoner's hand-writing; but this would carry the case but a short way, inasmuch as the receipts were in the custody of Williamson, and he could not be imposed upon as a person might be by a stranger producing a receipt purporting to be signed by the real party.

The only evidence which could in any way be relied on for such a purpose is that of the senior Murphy, who speaks of repeated applications to Williamson for his son's warrant.

He states: "After its date I called upon Williamson to collect said bill, and asked for said warrant; he said there was no warrant there for me or my son, and this was the reply on five or six several occasions when I called."

Coupling this evidence with the manifest fact that the signatures, by whomsoever written, are written in a feigned hand, so as to convey to any person looking at them the impression that they were not written by the same party, but professed to be written by three separate hands, the case assumes a different aspect. If the County Judge had come to the conclusion that this was a plot by these

two people to pass off as genuine the signatures of these several persons, that, in other words, Williamson was an accomplice in the actual crime, I should find it difficult to say that there is not sufficient evidence to warrant their commitment, and that they would each be liable to be put upon his trial for the offence of forgery.

Upon this ground, therefore, I am prepared to concur in the judgment that the appeal be dismissed.

It remains to consider the objections as to the rejection of evidence.

The question raised as to the accused giving evidence on his own behalf, was properly abandoned on the argument.

The other two are, I think, fully answered in the judgment of my brother Patterson, in addition to which I have only to say, speaking for myself, that I entertain very serious doubts, for the reasons which I stated in the earlier part of this judgment, whether section 9 of the Imperial Act of 1870 was ever in force in this Province.

If the prosecution had chosen to rely upon the evidence of Huggard and Janney to prove the offence, the accused might very properly, I think, have called Williamson for the purpose of explaining the transaction, and of shewing that what appeared to be forgery was not so in fact; and if the learned Judge believed him there would in my view of the law be an end of the case, but I do not think any such case has been made out here, as would warrant us in interfering with the decision on this ground.

I have, therefore, not without some hesitation, come to the conclusion, that for the reasons I have given there is evidence which might have justified the learned Judge of the County Court in committing, and we ought not therefore to interfere.

PATTERSON, J. A.—On 26th September, 1882, a complaint was made under oath by one Percival E. Bell, a detective, before the Judge of the County Court of the County of Wentworth, charging Ellis P. Phipps, a person found within the limits of Canada, with having committed in the

State of Pennsylvania the crime of forgery, and the Judge thereupon issued his warrant for the apprehension of the person so charged. So far there can be no question that the proceedings were strictly within the first section of 31 Vict. ch. 94.

The next duty of the Judge, as prescribed by that section, was, upon the said person being brought before him under such warrant, to examine upon oath any person or persons touching the truth of such charge; and upon such evidence as according to the laws of this Province would justify the apprehension and committal for trial of the person accused, if the crime of which he was accused had been committed in this Province, he was authorized to commit him for extradition.

With regard to evidence, the second section of the statute enacted that in case of such a complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person issuing that warrant, and attested by the oath of the party producing them to be true copies of the original depositions, might be received in evidence of the criminality of the person so apprehended.

The Imperial Extradition Act, 1870, contained in secs. 14 and 15 a further provision upon the same subject, to the effect that depositions or statements on oath taken in a foreign state, and copies of them, may, if duly authenticated, be received in evidence in proceedings under that Act; and that they should be deemed duly authenticated for the purposes of the Act, if authenticated in manner provided for the time being by law, or authenticated as there pointed out: viz., if the depositions or statements or the copies thereof purported to be certified under the hand of a Judge, magistrate, or officer of the foreign state where they were taken, to be the original depositions or statements or to be true copies thereof; and were also authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice, or some other minister of state.

The Act of 1870 is said to have ceased to apply to Canada, by virtue of an order in council, issued under the 18th section of the Act. We have no official notice of this ; but, taking it to be so, the Act applied to Canada at the time of the proceedings in discussion, to the extent pointed out in *Regina v. Brown*, 6 A. R. 386.

The accused was brought before the Judge on 7th October, 1882, under his warrant. Evidence was then taken by the Judge. Some of it was oral evidence given in his presence, but an essential portion of it consisted of original depositions, and of copies of the same depositions made in the United States, on 30th September, which was after the apprehension of the accused. They were taken before the Honourable Joseph Allison, President Judge of the Court of Common Pleas, No. 1, for the city and county of Philadelphia, and a Justice of the Court of Oyer and Terminer and general gaol delivery in and for the said county, and of the Court of Quarter Sessions of the Peace in and for the said city and county, and *ex officio* Justice of the Peace in and for the said city and county.

The certificate of Judge Allison shewed that an information and complaint, which he set out, was laid before him on 30th September, by one Meyers, for the forgeries in question ; that thereupon the evidence contained in the depositions was duly taken before him ; that each of the witnesses was duly sworn, and his jurat or oath, or affirmation, duly attested by A. Wilson Henszey, the Acting or Deputy Clerk of the Court of Quarter Sessions, who signed the same by the Judge's direction ; and that Henszey is an officer of the Court duly qualified and authorized to administer and subscribe oaths and affirmations.

Mr. Graham, the District Attorney for Philadelphia, gave *vivâ voce* testimony, proving the same facts which Judge Allison had certified. There was the additional fact certified and proved, that upon those depositions the Judge had issued a warrant for the apprehension of Phipps, which warrant was also produced.

Several objections were made before the Judge by counsel

for the prisoner to the reception of this evidence, and they have been renewed before us.

One was because the evidence was not taken until after the arrest in this province. These depositions were not taken, nor was the warrant issued, for the purpose of founding a charge against Phipps in Pennsylvania, or with a view to his apprehension in that State, for there was already an indictment pending against him there for each of the offences now charged, and a warrant had been issued upon those indictments; but they were taken and issued, as was conceded on the part of the prosecutors, for the purpose of being used as evidence here. This circumstance was strongly urged against the admissibility of the evidence, in connection with the objection that it was not taken till after the arrest.

In *Regina v. Brown*, 6 A. R. 386, the requisites under our statute and under the Imperial Act were considered, and I do not know that I can add anything to what I said on this subject in delivering the judgment of the Court in that case.

Under the view then taken of the statutes, I am of opinion that the depositions or copies were sufficiently authenticated and were admissible under either of the statutes, or, it may be more proper to say, under either of the rules, because as pointed out in *Brown's Case*, the statutes are to be read as one. The warrant in question, I think, satisfies the description of the "original warrant" under our statute. In addition to what I said on that point in *Brown's Case*, I may refer to the remarks of my brother Morrison, in *Re Martin*, 4 U. C. L. J. N. S. 199, to those of Mr. Justice Gwynne, in *Regina v. Morton*, 19 C. P. 31, and of Chief Justice Wilson, in *Re Caldwell*, 5 P. R. 217.

The objection to the time at which and the purpose for which these proceedings were taken in the United States is not covered by anything discussed in *Brown's Case*. It is, however, an objection to which we could not give effect without adding to the statutes a term which they at pre-

sent do not contain. The evidence comes within the letter of the statutes ; and although it may be plausibly argued that the policy of our statute in permitting *ex parte* evidence given in the foreign state to be acted on here, was to admit only such evidence as was *bond fide* taken with a view to be acted on in the foreign state, yet no such limitation is expressed, while in the provision of the Imperial Act, and in the statute of Canada, 40 Vict. ch. 25, which follows its language, there is nothing to suggest any such question. The practical result of the construction contended for would be that in many cases it would be impossible to procure the extradition of the fugitive, however clear his guilt might be.

There were some further objections of a formal character to the documents which it is unnecessary to notice at length. All the essential requisites are shewn as well by the evidence of Mr. Graham as by the certificate of the Judge to have existed, and we cannot insist that the same forms which are usual in our own proceedings shall be observed in other countries. This has often been held with respect to commissions for taking evidence and the affidavits, &c., required in connection with them. See cases in *Rob. & J. Dig. Col.* 1319, 1320.

Then the evidence being admissible, was it proper for the learned Judge of the County Court to commit the prisoner for extradition to answer the charge of forgery ?

We are told that the Blocksley Almshouse in Philadelphia is an institution supported by the city. It is under the management of a board called the Guardians of the Poor, elected or appointed by the city council. The board has a secretary, who in the present instance was Robert S. Williamson, and there is a superintendent of the almshouse, also appointed by the board, which was the office held by the prisoner Phipps. One of the duties of the superintendent is to receive from tradesmen who furnish supplies to the almshouse their accounts, and to adjust the amounts, and certify them for payment. Thereupon warrants or orders on the city treasurer are drawn by the



board for the payment of the amounts. These are in a book in the form of a check book, with marginal stub to each warrant. They are signed by the president and secretary of the board and countersigned by the city controller, and the book is entrusted to the secretary of the board, who delivers the warrants to the persons entitled to receive them, taking a receipt upon the stub. The warrants are drawn payable to the person named, or bearer.

The book produced contains the stubs of one thousand warrants, numbered from one to one thousand; they are dated in the last weeks of January, February, and March, 1882, and are apparently for the monthly accounts of those three months.

The charge is, that the prisoner forged the receipts upon three of these stubs, by writing the names Seeds & Ferguson, W. L. Murphy, and A. J. Bellows, without authority from those persons, thus giving receipts which on their face purported to be given by the persons entitled to the warrants, while he himself received the warrants and appropriated to his own use the money they called for.

The direct evidence of the act of writing the names is that of Williamson the secretary, who says that Phipps told him he had authority from the parties "to sign for and receive the said warrants." There is also evidence given by John Huggard, the chairman of the Board of Guardians, and of William S. Janney, one of the sureties of Phipps. Both of these gentlemen say they are acquainted with the handwriting of Phipps and that the signatures in question are in his handwriting. I understand this to be given as their opinion from their knowledge of the ordinary handwriting of the prisoner, though their depositions, particularly that of Mr. Huggard, are rather indistinct on the point. I should not, for my own part, place much reliance on the opinions they give, because when I look at the three signatures they present to my apprehension no features of similarity. They seem to me to exclude the idea of their being written by the same person in his own usual handwriting. Assuming them to have been written by the

same person, I should say the object of the writer was to conceal that fact, and that his aim was to give the names he wrote the appearance of the genuine signatures of three different persons, even though he may not have attempted to produce an approximation to the character of signatures which he knew.

The three parties, Seeds, Murphy, and Bellows, deny upon oath the genuineness of the signatures and the authority to Phipps. The warrants are dated 27th March, 1882. Mr. Seeds deposes that late in August, 1882, the prisoner called at the place of business of Seeds & Ferguson, and said that the committee would meet in a few days, and that Seeds would get his money not later than Monday, by which day he was a fugitive.

Murphy shews that Phipps paid him his money in June, after Murphy's father had learned at the treasurer's office that it had been paid, and had spoken to Phipps about it.

Bellows deposes that in the latter part of August he asked Phipps about his warrant, when Phipps told him he had been so hurried, so many things to attend to, that he had not come to Bellows's account yet, but would let him know in a few days, since which he had not seen him.

The warrant clerk in the treasurer's office swore that the three warrants had been paid, he could not say to whom, between the 1st and the 19th of April.

William Murphy, the father of Walter L. Murphy, gave important evidence. He spoke of repeated applications to Williamson for his son's warrant. Williamson's statements were objected to as not being proper evidence against Phipps; but the fact of the unsuccessful applications at the office of the board, leading up to interviews with Phipps himself, was clearly good evidence. As to these interviews, Mr. Murphy's story is this: "I called on Ellis P. Phipps, the superintendent of the almshouse, and demanded my son's money. After receiving repeated promises of payment from Phipps, he finally told me about August that he would pay the bill out of his own warrant, for salary which was due, or about due. When I told

Ellis P. Phipps that I knew the warrant had already been issued and paid, he did not deny it, or make any other reply than that I should get the money—not to fear, the bill would be paid. He also endeavoured to raise money on some mortgage of real estate to pay the bill. I pressed and urged him to pay, and he persistently promised, until, seeing that his time of service at the almshouse was quite short, he being obliged to resign by September, (the present month) I threatened him with suit, when he came in and paid the bill in money. This was during the month of August, 1882. At the time he paid the money he asked from me a receipt, and also an order for the warrant upon the secretary of the board, and requested that the date of the said order for the warrant should be left blank. This was done.”

If I were acting as a magistrate, and facts such as these were proved before me on an information for forgery committed in this Province, I think it would be my duty to commit the accused for trial; and I think also that I should have to charge the jury, on a trial for forgery, that such facts were sufficient to warrant a conviction.

It is contended, and this is the strong ground on the part of the prisoner, that the offence was not forgery, because Williamson, to whom the receipts were given, knew that they were signed by Phipps, and not by the parties whose names he wrote; and that while he may have been guilty of fraud and falsehood in stating to Williamson that he had authority to sign the names, (if that is the meaning of Williamson's expression, “sign for the receipts”) still he never pretended to Williamson, nor did Williamson for a moment suppose, that the writings were anything but what they really were; and that Williamson was deceived by the false representation and not by the writing.

I am, perhaps, going a little beyond the contention of counsel, as I certainly would be going further than the evidence goes, in saying that Williamson was deceived by Phipps; for Williamson himself, while he says that Phipps said he had authority, happens not to say that *he* did not

know better, or that he was induced by the representation to part with the warrants.

This may not be a matter of much consequence, because the immediate point made is, that Williamson's knowledge that the names were written by Phipps deprived the transaction of the character of a criminal act of forgery; and if that is the effect, it must be equally so whether Williamson was deceived by Phipps or was acting in collusion with him.

Almost any of the many definitions of the crime of forgery which we had occasion to refer to in the recent case of *Re (Hall, ante p. 31)*, will be comprehensive enough for our present purpose. We may take one from *Parke and Brown's Case*, Leach, 775, "The false making a note or other instrument with intent to defraud:" or that given by Buller, J., in *Regina v. Coogan*, Leach, 448, "A false signature made with intent to deceive."

There was here undoubtedly, if the evidence is to be relied on, the false making of the receipts. They were made to appear to be receipts given by the parties whose names were signed, while they were neither given by them nor with their authority. They were false instruments, and they were forged instruments. The question is, can they be said, upon the evidence, to have been forged with intent to defraud, so as to make the forgery a crime?

The intent to defraud must, I apprehend, be an intent to defraud *by means of the false writing*. That writing must be designed to be the instrument by which the deception or fraud is effected.

Upon the evidence before us, Williamson, assuming him to have been deceived, was not deceived by the false instrument, because he knew it was not made by the party personally. If he was deceived it was by the verbal representation that Phipps had authority to receive the warrants and to sign the vouchers. Therefore, if the case turned upon an alleged intent to deceive or defraud Williamson, I am inclined to think it should fail. It would somewhat resemble a case before the Supreme Judicial Court of

Massachusetts to which we have been referred, *Commonwealth v. Baldwin*, 11 Gray 197. In that case the indictment was for forging a promissory note with intent to defraud Russell Phelps the payee. The note had been signed by the accused in the name of Schouler, Baldwin & Co., in the presence of Phelps, to whom the accused falsely represented that he was a member of the firm. That was held not to be a forgery. I say nothing of the general views expressed respecting the crime in the judgment delivered, further than that the principle is questioned under which, at a later date, *Regina v. Ritson*, L. R. 1 C. C. R. 203, was decided. The ground of the decision I understand to be that inasmuch as Russell Phelps was not led to believe that the note was made by any one but the accused, the charge was not sustained. *Dicta* of eminent English Judges could be cited, and amongst others, those of Parke, B., and Coleman, J., in *Regina v. White*, 2 Cox 218, to the effect that though not a forgery as to the party present when the bill was made, it would be a forgery as to subsequent holders. The case in Massachusetts is not, so far as the point actually decided is concerned, opposed to that doctrine; and the form of the charge made it unnecessary for the Court to look beyond Russell Phelps, whose position in relation to the charge was analogous to that of Williamson in the case before us.

*Regina v. White*, (2 C. & K. 404; 2 Cox. 210; Den. 208,) which was much relied on for the prisoner, is only an authority in his favour so far as our view is bounded by the immediate transaction with Williamson. The instrument in question, in that case, which was signed, "*per proc.* Thomas Tomlinson, Emanuel White," carried on its face a notice to every one who saw it that Thomas Tomlinson did not write the name, but that White professed to have an authority to make the bill for him. To the same effect is the judgment of the Supreme Court of Minnesota, in *Commonwealth v. Wilson*, (a MS. copy of which has been furnished to us). In this case the notice was given to Williamson only. Every other person reading the receipts

would naturally infer that they were signed by the parties whose names they bore.

But the effect of the evidence on this topic does not stop here, as I apprehend it. It was not that no notice is conveyed by, or in connection with, the signatures, that the prisoner was the person whose hand wrote them; there is evidence which could not be withheld from a jury in the appearance of the signatures themselves, that, if the prisoner wrote them, he designedly adopted for each of them a different style of writing, for the purpose of leading those who saw them to believe that they were written by three different hands.

This would be in itself an indication of fraudulent intent, and it would go in the direction of supplying the technical elements of the crime of forgery, by affording ground for the inference that the fraud, undoubtedly committed by the appropriation of the money of the complainants, was associated with an intent to deceive *by means of the false instruments*. They were not intended to deceive Williamson, as for the purpose of this discussion we assume. As far as Williamson was concerned, the prisoner, if he wrote them, might as well have written them in his ordinary handwriting. But they are so different in appearance that a jury would be justified in asking why were they so written? Was it for the purpose of deception? If so, the inference would be fair that some person, other than Williamson, was intended to be deceived. This would be a legitimate conclusion from the other portions of the evidence, but taking the evidence as a whole this part of it is far from unimportant.

I am not able to understand why we should confine our view, or assume that the prisoner confined his fraudulent intent, to the immediate transaction with Williamson. The city treasurer, by whom the moneys were paid, paid them to the bearer of the warrant, but necessarily on the assumption that the bearer derived title from the persons to whom alone Williamson was authorized to issue them. We are not bound to put together a chain of imaginary circumstances.

in which the forged receipts may be supposed to come into actual play as part of the machinery of the fraud. We might invent a theory that satisfied ourselves, without hitting the precise intent which actuated the forger. It is enough that a jury shall be satisfied of the presence of the intent when the false writing was made, without being driven to define the exact part assigned to the writings in the forger's scheme. At the same time we should be satisfied that the writings were capable, in circumstances not unlikely to have been in contemplation, of being used to deceive—in this case, to deceive some one besides Williamson—and by so doing to aid in effecting the intent to defraud. It is natural to think of either the city, represented by the treasurer, or the persons entitled to the money, as those intended in this instance to be defrauded. And we have only to suppose the very probable occurrence of an application to the treasurer by those who found they were not receiving payment of their accounts, to find one case in which the writings might do duty as vouchers. In the eyes of the treasurer they would be genuine signatures, and they would be evidence to him that the claimant was making a false claim. Williamson might or might not be forthcoming to explain matters, or might or might not give an honest account when questioned about it.

There would be a presumptive case against the claimant. He might be fortunate enough to displace it and recover his money ; but the necessity for doing this and the risk would be a prejudice to him. Even if he succeeded he would have been defrauded, though not to the same extent as if he failed, which, where falsehood and fraud were the weapons he had to encounter, would be a conceivable result.

The case of *Regina v. Nash*, 2 Den. C. C. 493, which was cited by the learned Judge of the county Court, is a strong authority against the necessity for a close inquiry whether there was any person who could be defrauded by the false writing, if the intent to defraud existed.

Upon the evidence received by the learned Judge, there



would in my opinion, be quite sufficient foundation for finding an intent to defraud Murphy and the others, and I am inclined also to think an intent to defraud the city.

But it was contended that certain evidence which the prisoner proposed to adduce should have been received. This proposed evidence was of three kinds, or was offered for three purposes. One purpose was to destroy the effect of the evidence of Williamson, without which it was assumed the case would have been incomplete, by shewing that Williamson was *non compos mentis*.

Apart from the general question of the right of the accused to call witnesses in his defence before the Magistrate or Judge, it would be impossible to hold that the evidence taken by the Judge in Philadelphia, before whom the witness personally appeared, and who had not considered him incompetent to testify, could be rejected upon an opinion expressed by some other witness. There was evidence respecting Williamson given by several of those who made depositions, and by Mr. Graham who was present when these depositions were made. At the utmost all that could have been done would have been to create a conflict of evidence; and the learned Judge would in that case have done right in leaving the jury who should try the case to deal with the witness and his testimony.

The other two classes of evidence were to shew that the prisoner was not guilty of the acts charged against him; or that those acts did not constitute an extradition crime.

I have experienced some difficulty in dealing with this part of the case, from being unable precisely to understand what was proposed to be proved. There was no such tender of evidence and rejection of it as is ordinarily found. What was done was rather to endeavour to obtain from the Judge an expression of his view as to receiving or rejecting the evidence if it should be offered. This would doubtless be a convenient enough course, and would save the expense and perhaps delay of bringing witnesses from a distance. But if the Judge's decision were not to be acquiesced in, and the intention was to insist before an



appellate Court upon the right to give the evidence, it would have been more satisfactory to have it more precisely shewn what was the evidence that was forthcoming. If we should now say that it would be competent to the prisoner to prove such and such facts, we could not send the case back with any confidence that there had been or would be evidence of such facts forthcoming. The whole matter appears to me so speculative as to be unsafe to act upon in opposition to the opinions of both the Judge and the Court below. But, as far as I understand what is asked of us, I cannot see any reason for saying that the Judge was wrong in his action.

The right to give evidence must be contended for on one of two grounds: viz., that a person charged before a magistrate with an indictable offence has a right to call witnesses for his defence; or that a person charged with a crime for which his extradition is demanded, may give evidence to shew that what he is charged with is not an extradition crime.

Under our Statute, 31 Vict. ch. 94, sec. 1, it is the duty of the Judge to examine upon oath any person or persons touching the truth of the charge, and upon such evidence as according to the laws of the Province would justify the apprehension and committal for trial of the person accused, if the crime had been committed in the Province, to commit for extradition.

Upon a charge for an indictable offence committed in the Province, the magistrate is (by 32 & 33 Vict. ch. 30, sec. 29,) in the presence of the accused person (who shall be at liberty to put questions to any witness produced against him,) to take the statement on oath or affirmation "of those who know the facts and circumstances of the case." After the examination of all the witnesses for the prosecution has been completed, the Justice is, (by sec. 31) to read them to the accused, "and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you

desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial ;' and whatever the prisoner then says in answer thereto shall be taken down in writing and read over to him, and shall be signed by the Justice or Justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned."

Section 25 empowers any Justice of the Peace to summon persons who will not voluntarily appear, and who are shewn to be likely to give material evidence *for the prosecution*.

By sec. 56, "when all the evidence offered *upon the part of the prosecution* against the accused party has been heard \* \* if in the opinion of such justice or justices the evidence is sufficient to put the accused party upon his trial for an indictable offence, although it may not raise such a strong presumption of guilt as would induce them to commit the accused for trial without bail, or if the offence with which the party is accused is a misdemeanor, then the Justices shall admit the party to bail as hereinbefore provided ; but if the offence be a felony and the evidence given is such as to raise a strong presumption of guilt, then the Justice or Justices shall by his or their warrant commit him to the common gaol," &c.

These sections of the act regulating the duties of Justices of the Peace, out of Sessions, in relation to indictable offences, furnish the criterion of the duty of the Judge or Magistrate under the Extradition Act. The evidence which would make it proper to put a man upon his trial for an offence alleged to have been committed within the jurisdiction of the justice, is sufficient to warrant a committal for extradition.

It may be remarked, in passing, that the phrase "justify the apprehension and committal for trial of the person accused" cannot, as suggested in argument, be held to refer to such evidence only as would lead a magistrate, acting under the statute respecting indictable offences, to refuse to take bail.

I have quoted at some length the provisions of sections 25, 29, 31 and 56, for the purpose of pointing out that the only evidence contemplated, or at all events the only evidence spoken of in the statute, as being before the committing magistrate, is evidence for the prosecution. There is no allusion to the reception of evidence in defence of the person accused ; and although nothing is expressly said in exclusion of such evidence, and the direction given by section 29 to take the statements of "those who know the facts and circumstances of the case," is wide enough to include exculpatory evidence adduced by the accused, yet the general tenor of the provisions seems to treat the examination as closed when all the evidence offered on the part of the prosecution against the accused party has been heard.

There is not much discussion of this subject to be found in the books so far as I have been able to find. It is referred to at page 506 of the supplement to the 29th edition of Burn's Justice, 1852. In a note on page 507, is given the opinion of Sir A. E. Cockburn, A.G., and Messrs. Crompton, Ellis, and Hall. Upon the immediate subject of the power or duty of a magistrate, under a statute similar to ours, to receive evidence for the accused, they say : "The question firstly submitted to us is certainly not free from difficulty, but considering that the practice under the old statutes (1 & 2 Phil. & M. ch. 13, and 2 & 3 Phil. & M. ch. 10,) as stated by Dalton, Comt. Just., ch. 165, ed. 1746, was to examine a prisoner's witnesses, and that the language of the 11 & 12 Vict. ch. 42, sec. 17, admits of such a construction, and that the interests of justice require it, we think that it is incumbent on magistrates to hear and examine such of the witnesses offered by a prisoner as appear (in the language of the statute,) to know the facts and circumstances of the case."

The reference to the subject is not reproduced in the 30th edition of Burn's Justice, published in 1869, probably by reason of the passage of the Act 30 & 31 Vict. ch. 35, in 1867, which contained, in sec. 3, a provision which has not yet been adopted in our legislation. That section

made it the duty of the Justice, before committing the accused person for trial or admitting him to bail, to ask if he desired to call witnesses, and to take the examination of such witnesses as should be called and who should know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of the accused person, and to return the depositions of such of them, not being merely witnesses as to character, as should appear to give evidence in any way material to the case, or tending to prove the innocence of the accused person, and to bind them over to give evidence at the trial.

The object of this amendment of the law does not seem to have been to enable or authorize the justice to try the charge upon a balance of testimony, any further than he could formerly have done; but to enable the accused to secure the presence of his witnesses at the trial. This appears from the recital at the beginning of the second section, and from the remarks, made in similar language, but with greater emphasis, by Lord Cranworth in moving the second reading of the bill in the House of Lords. He is reported in Hansard to have said that the clause was one which it was most important for the honour of the country should be made the law of the land. In almost all prosecutions the expenses of witnesses bound over to prosecute were allowed; but it was not so on the part of the defence. Complaint was frequently made by persons charged with indictable offences upon their trial that they were unable from want of means to call witnesses who could prove facts which would establish their innocence; and accordingly the second clause provided that where a person was charged with any indictable offence, the magistrate should before committing for trial ask him whether he desired to call any witnesses for his defence; and in the event of his answering in the affirmative, the magistrate should take the depositions of such witnesses, who should be bound over to appear to give evidence on the trial, in the same manner as other witnesses, in which case their expenses would of course be paid.

The passage in Dalton referred to in the opinion of Sir A. E. Cockburn, &c., is, I think, the following: "It seemeth just and right, the Justices of Peace who take information against a felon or person suspect of felony should take and certify as well such information, proof and evidence as goeth to the acquittal or clearing of the prisoner, as such as makes for the King, and against the prisoner; for such information, evidence or proof taken, and the certifying thereof by the Justice of Peace, is only to inform the King and his Justices of gaol delivery, &c., of the truth of the matter.

"And Sir Edward Coke (at Lent Assizes at Bury, 5 Jac.) advised a coroner that he ought to have done accordingly, as I have heard.

"But *quære*, if the Justices of Peace or coroner may take upon oath such information, evidence or proof, as maketh against the King. It seemeth no."

I extend my quotation to another passage, which does not relate to Justices of the Peace, for the sake of another reference, which sounds oddly in modern ears, to the use of evidence not under oath.

"Upon the trial of felons before the Justices of gaol delivery, the said Justices will often hear witnesses and evidence which goeth to the clearing and acquittal of the prisoner, yet they will not take upon oath, but do leave such testimony and evidence to the jury, to give credit or to think thereof as they shall see and find cause."

"Popham, Chief Justice, (at Cambridge Assizes, *tempore Eliz.*) committed one to prison, who upon the trial of a felon called out that he could give evidence for the Queen; and when he was sworn he gave evidence to acquit the offender."

The opinion of the eminent lawyers from which I have made a citation does not go the length of stating what particular effect is to be given by a magistrate to evidence which he may receive on the part of a person accused before him. The law on the subject of the examination of such witnesses, they say, appears open to considerable

doubt, which it would be desirable to have cleared up by further legislation. That may perhaps have been done in England by the Act 30 & 31 Vict. ch. 35, though passed *alio intuitu*. With us the law stands as it did in England when the opinion was given. Probably no better statement of the question as it stands with us, and I think certainly none more favourable to the prisoner's contention, can be found than that contained in Lord Denman's charge to the grand jury at the Taunton Assizes, in April, 1849, which I take from the note of it in 2 C. & K. at p. 845. "In all cases," the Lord Chief Justice said, "in which prisoners charged with felony have witnesses, and those witnesses are in attendance at the time of the examination before the magistrate, I should recommend that the magistrate should hear the evidence of such witnesses as the prisoner, on being asked, wishes to be examined in his defence. If such witnesses merely explain what has been proved in support of the charge, and are believed, they will actually have made out a defence on behalf of the accused, and there would of course be no necessity for further proceedings; but if the witnesses so called contradict those for the prosecution in material points, then the case would be properly sent to a jury to ascertain the truth of the statements of each party; and the depositions of the prisoner's witnesses being taken and signed by them, should be transmitted to the Judge, together with the depositions in support of the charge."

Now, with all the light I can gain from the references I have made, I am unable to see any reasonable ground for the complaint in the present case that evidence to disprove the commission of the acts charged against the prisoner was rejected. What was proposed was not to explain the acts proved on the part of the prosecution so as to remove from them the imputation of criminality. It was to disprove the acts themselves, or, in other words, to present to the Judge evidence which should be in conflict with that offered for the prosecution. If he had received such evidence in relation to acts committed here, it would have been his duty, notwithstanding any impression it made upon his

own mind, to send the case for trial. That I understand to be the tenor of all the authorities. The secondary purposes for which the evidence might be receivable, in relation to an offence committed here, whether to be gathered from the opinions I have referred to, or such as are expressed in the English Act of 1867, which is not in force with us, are matters relating to our own Courts and procedure, and are beside the present inquiry.

After all, I am not satisfied that the evidence spoken of could have been brought within the language of our statute. I am inclined to the opinion that it could not. I do not allude to the offer of the prisoner's oath on his own behalf. There is no ground for holding it to be admissible. I refer to the experts who were to say that they did not consider the handwriting to be that of the prisoner. They were not persons who "knew the facts and circumstances of the case." They were only to give opinions, not to swear to facts.

I give this as the inclination of my opinion only, because it may happen that evidence of this kind has to be relied on in prosecutions for forgery, and must be received by the magistrate when offered for the prosecution, as indeed it was in this case. The opinion I give is against the right of the accused to insist on such evidence being received under the words of section 29, as against direct evidence of "facts and circumstances."

The other branch of the evidence offered was that of experts in the law of Pennsylvania, who were to shew that *the charge was not forgery* by the law of that state.

It is upon this branch in particular that I feel dissatisfied with the way in which the complaint was presented, or the so called tender of evidence made, as the matter is reported to us. What is *the charge*? If it is that set out in the indictments pending in Philadelphia, I agree that it is not forgery, by our law, and I require no evidence to prove that it is not forgery by the foreign law. That charge is under a section of the Pennsylvanian statute relating to forgery which has been put in evidence; but it is a section

which, like some sections in our own statute on the same subject, makes certain acts punishable without declaring them to be forgery, and without the necessary presence of one essential element of forgery, namely, that the writing shall be a *false writing*.

But the charge in the information laid on 26th September, before Judge Sinclair, is, in terms, for forging the documents there set out, and so is that laid before Judge Allison on 30th September. Unless, therefore, it was proposed to prove that by the law of Pennsylvania such documents could not be the subject of forgery, the evidence would not have reached the point. I do not understand that any proposal reaching to that length was made, and there is nothing before us to indicate that evidence going that length could have *bond fide* been offered. But if it had been offered and given, it would, as in the former case, have created only a conflict of testimony, because Mr. Graham had sworn that the common law continues to attach to the crime of forgery in the State of Pennsylvania.

Then there is another grave difficulty in the way of the objection. Was the evidence relevant?

The claim for its admission was rested upon the ninth section of the Extradition Act, 1870, which enacted that the police magistrate should receive any evidence which might be tendered to shew that the crime of which the prisoner was accused or alleged to have been convicted was an offence of a political character, or was not an extradition crime.

The term "extradition crime" is defined in section 26, to mean a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to the Act; and that schedule, which contained forgery among the list of crimes, declared that the list was to be construed according to the law existing in England, or in a British possession (as the case may be,) at the date of the alleged crime, whether by common law or by statute made before or after the passing of the Act.

This makes it immaterial, if we are guided by the



English Act, to know what was the law of Pennsylvania; and without the English Act the prisoner has no foundation for his demand.

The result of the best consideration I have been able to give to the case is, that in my opinion the prisoner was properly remanded by the Court below, and that we should dismiss the appeal.

FERGUSON, J.—The facts and circumstances are, so far as appears necessary, concisely stated in the judgment of the learned Chief Justice. They are also stated in former judgments in the case, and, it seems wholly unnecessary that I should repeat them here.

The witness John Huggard, as appears by his depositions, had ample opportunity of becoming acquainted with the hand-writing of the prisoner, and he swears that he is familiar with it, and that the names, "Walter S. Murphy," "Seeds & Ferguson," and "A. J. Bellows & Co.," signed to the receipts in question, are in the handwriting of the prisoner. The witness William Janney gives the like testimony. The evidence of Walter S. Murphy, John A. Seeds, and Andrew J. Bellows, is very strong to shew that the prisoner had not authority to sign these names or any of them to the receipts, and, if he did write these names, it can scarcely be said that the intent in so doing was not fraudulent.

The witness Williamson, who was the custodian of the receipts in blank, and of the warrants for the payment of money, of which the receipts were the counterfoils, says that he saw the prisoner write these names, and that the prisoner told him at the time of his so doing that he was authorized by the parties respectively whose names he signed.

The witness William Murphy, the father of Walter S. Murphy, says, that after the warrant in favour of his son had been issued by the board, and after its date, the 27th March, 1882, he called upon the secretary Williamson to collect his son's bill, and asked him for the warrant, and

that Williamson said, "there was no warrant there for *him or his son*," and this he says was Williamson's reply on five or six several occasions when he called at the office: that becoming tired of visiting the secretary Williamson he instituted a *search* and found, at the city controller's office, that the warrants in favour of his son had been issued and paid, and that then, by the direction of Williamson, he called upon the prisoner and demanded from him payment of the money. This witness says that when he told the prisoner that he knew the warrant had been issued, he (the prisoner) did not deny it, or make any other reply than that he (the witness) should get the money. After stating some other things that passed between him and the prisoner, this witness says that when he threatened the prisoner with suit, he came in and paid the money, and that, when he paid it, the prisoner asked for a receipt and also for an order for the warrant upon the secretary Williamson, and requested that the date of this order should be left blank, which was done, and the order given him.

The receipts are produced, and if it be assumed that the signatures to them were in fact written by the prisoner, I think it is manifest they are written in a feigned hand. No two of them appear to me to be in the same style of writing.

It was contended on behalf of the prisoner that, in as much as the evidence shews that the names were written in the presence of Williamson, the prisoner representing at the time that he had authority to write them, even though this representation was false and fraudulent, the offence could not be the crime of forgery, and therefore not within the provisions of the extradition laws. Many authorities were referred to. The case of *Regina v. White* 2 Cox 210, was chiefly relied on.

Oral testimony as to the foreign law was given by the witness Graham, a lawyer from Pennsylvania, and he said: "Assuming the facts to be true as stated in these depositions, the crime of forgery is made out under the law in

the State of Pennsylvania, both as that law existed at the time of making the treaty in 1842, and as the law stands at present. It also makes out the offence of forgery at common law as it is received and interpreted by us."

The conduct of the prisoner when applied to by Murphy, and at the time he paid the money, the conduct of Williamson, by whom Murphy had been referred to the prisoner, and the fact that the signatures, which as Williamson says were written in his presence by the prisoner, appear to be in a feigned hand. taken in connection with the other circumstances of the case, seem to afford reasonable ground for the inference that Williamson and the prisoner were in collusion, and that they had combined together for the purpose of defrauding, by means of these false documents,

the board of guardians and, perhaps, ultimately the persons whose names were signed to the receipts, and that in pursuance of this scheme and as a part of it the crime was committed; and I think the statement of Williamson as to the representation made by the prisoner at the time he says the receipts were signed, may reasonably be considered as a statement made in exculpation of himself. The Judge of the County Court was not bound to believe it at all, and, in this view of the case, I think the evidence sufficient to warrant the committal of the prisoner for the crime of forgery at common law, and it is shewn that the common law exists in the state of Pennsylvania.

As to the complaint respecting the rejection of evidence: What was offered, as I understood counsel, was evidence to shew that the offence committed in the way stated by Williamson was not forgery according to the foreign law. In the view I have taken of the case this negative was not material. In any view of it, if given, the evidence had it been received could only have caused a conflict of testimony as to the foreign law, and this would not have been a matter to be decided by the Judge.

The question as to whether or not the offence, if committed in the way stated by Williamson, was forgery, or distinguishable from *White's Case*, was much discussed at

the bar. I do not think it necessary that this should be determined, but, as the learned Judges of this Court, with whom I have the honour to sit, do give their opinions upon it, I feel called upon to express my view, which is this: If the act was done just as Williamson says, namely, the false documents made in his presence, to be delivered to him, he being innocent, and ignorant of any wrong being done, as was the case with the banker in *White's Case*, the prisoner then stating that he had authority to sign the names, I think, and with great respect for the opinions of those from whom I differ, that the offence would not be forgery, because the intent would then appear to be an intent to defraud by means of a false verbal representation, whereas to constitute the crime of forgery the intent must be, I think, an intent to defraud by means of the false document. This idea is, I think, accurately expressed by the words that occur in the English form of indictment "with intent thereby then to defraud." I agree as to the reception of the depositions, and I think the appeal should be dismissed.

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## OLIVER V. NEWHOUSE.

*Landlord and tenant—Lease of farm with right to use stock—Right to sell stock on farm—Revesting in landlord.*

By a verbal agreement, entered into in June, 1876, the plaintiff leased to his son, M., who was residing with him, the farm occupied by them, for five years, at an annual rent of \$100, M. agreeing also to support the plaintiff and the other members of his family. By the terms of the agreement M. was to have the use and enjoyment of the stock and implements on the premises, estimated to be worth \$1,010. It was also stipulated that M. should have power to sell or otherwise dispose of such portions of the stock and implements as he might think desirable, but at the conclusion or sooner determination of the term, he was to leave others of equal value, any surplus above that amount to be his own. Either party was to be at liberty to determine the lease at any time he thought fit to do so. In January, 1879, M. having become financially embarrassed, and finding he was losing by the farm, expressed his determination to try some other mode of life, and said that the plaintiff might have the place and the stock, &c., thereon, if he, the plaintiff, would discharge him from any claim in respect of the rent, no portion of which had been paid. M. did accordingly abandon the place, and the plaintiff thereupon assumed the management and control thereof, and took possession of the stock, &c. M. subsequently returned to his father's and continued to reside and work on the farm for his father. In March following M. executed a surrender to the plaintiff of all his right and interest in or to the farm and the crops upon it. In the month of April, for the expressed consideration of \$340, which it was alleged his father had lent him, he also executed a memorandum assigning to the plaintiff all his interest in the stock and farming implements, &c., on the place, which included, it was said, a buggy, cutter, and harness, which had been purchased by M. for his own use.

In October, 1879, the defendant sued out execution against M., under which the sheriff seized the farm stock and implements, together with the said buggy, cutter, and harness. In an interpleader proceeding by the father, in which a verdict was rendered for the plaintiff, on appeal from a rule refusing to set such verdict aside,

*Held*, that the lease from the father to his son had the effect of vesting the chattel property in the latter ; and

*Quære*, whether it was afterwards revested in the father by the writings executed by M. ; but as the question whether there had been a delivery and change of possession sufficient under the Bills of Sale Act had not been passed upon by the jury, and as some doubt existed in respect of the buggy, cutter, and harness, a new trial was ordered ; costs to abide the result.

THIS was an appeal from the judgment of the Court of Common Pleas, discharging a rule *nisi*, obtained on behalf of the defendant in the Court below, to set aside a verdict entered for the plaintiff at the Autumn Assizes at Brampton, for 1880, and to enter the same for the defendant, or for a new trial.

The matter in question arose upon an interpleader issue, wherein Robert Oliver affirmed and William Newhouse denied, that certain goods and chattels, on the 7th of November, 1879, seized by the Sheriff of the County of Peel under a writ of *fiery facias*, issued out of Her Majesty's Court of Common Pleas for Ontario, by Newhouse against one Malcolm Oliver, and delivered to the sheriff on the 29th of October, 1879, were, or some part thereof was, at the time of the delivery of the writ the property of the said Robert Oliver as against the said William Newhouse.

The cause was tried before Paterson, J. A., and a jury, when a verdict was rendered for the plaintiff.

At the trial the two following exhibits, referred to in the judgment, were proved in order to establish the fact that Malcolm Oliver had transferred all his claim and interest in the property to his father, the plaintiff.

"I hereby surrender all right and interest in the west half of lot No. 2, in the 1st concession W. H. street, Caledon, to Robert Oliver, together with all claim to the crops in the ground thereon, in consideration of the rent due to him therefor for the last three years, (three hundred dollars).

"Dated March 12th, 1879.

"As witness my hand and seal.

"MALCOLM OLIVER.

"Witness: "WILLIAM OLIVER."

CALEDON, April 4th, 1879.

"Received from Robert Oliver the sum of three hundred and forty dollars, being full value for what interest I have had in all stock and farming implements, ploughs, harrows, cultivators, waggons, sleighs, cutters, buggies, on lot number two, in the first concession west, in the township of Caledon.

"MALCOLM OLIVER."

The other facts of the case are clearly stated in the report, 32 C. P. 90, and in the judgment.

The Appeal came on for argument on the 18th November, 1881.\*

\* *Present*.—SPRAGGE, C. J. O., BURTON, MORRISON, JJ.A., and ARMOUR, J.

*McCarthy*, Q.C., and *Milligan*, for the appellant. The contract between the respondent and his son Malcolm, as shewn by their own evidence, in respect to the goods in question, was one of sale and not of bailment, inasmuch as the son, by the terms thereof, had the option of returning the goods in specie, or an equivalent value in other chattels, and therefore any loss or damage during his term would have to be made good by him. The son was, therefore, at the time of the seizure, the owner both of the chattels owned by the respondent originally and of those purchased by himself during his term. This interpretation of the contract is the one plainly given to it by the respondent and his son in the latter's dealing with the property as his own, and the former acquiescing in and ratifying all such acts of ownership. Even if by the contract the property in the goods did not pass as between the parties to it, the respondent by allowing his son to hold himself out to purchasers, creditors, and others as the owner of the goods, and by ratifying acts of ownership on the part of the son, will be estopped as against a creditor of the latter from setting up that he was not the owner at the time of seizure. Apart from these reasons however, the chattels purchased by the son during his term were his own property, and as such liable to execution at the time of the seizure, there having been no transfer thereof by him to the respondent valid as against creditors. If the property in the goods in question was in the son during his term they were liable to execution, as there was not any sale thereof to the respondent valid as against creditors of the son, there being no bill of sale filed, and no evidence to submit to the jury of any immediate delivery, or of any actual and continued possession, as required by the statute, as appears from the evidence given at the trial. The learned Judge withdrew that question from the jury without objection on the part of the respondent, directing them to find a verdict in favour of the appellant for the three articles purchased by the son and included in the alleged transfer of the goods to the respondent, and he declared the verdict of the jury to be perverse in respect to those articles. If the verdict

should be taken as finding that there was a transfer of the goods in question to the respondent by his son, valid as against creditors, such finding would be against law and evidence, there being no sufficient evidence of delivery and change of possession as required by the statute, and such attempted transfer was a fraudulent and unjust preference of the respondent as a creditor. In addition to the cases mentioned in the judgment in the Court below, *Mallory v. Willis*, 4 Comstock 76; *Foster v. Pettebone*, 3 Selden 433; *Hyde v. Cookson*, 21 Barb. N. Y. 93; *Peers v. Carroll*, 19 U. C. R. 229; *Walker v. Hyman*, 1 A. R. 360; *Carr v. London & N.W. R. W. Co.*, L. R. 10 C. P. 307; *Reynell v. Lewis*, 15 M. & W. 527; *Carscallen v. Moodie*, 15 U. C. R. 92; *McLeod v. Hamilton*, 15 U. C. R. 111; *Frazer v. Lazier*, 9 U. C. R. 679; *Clarke v. Morell*, 21 U. C. R. 596; *Ontario Bank v. Clarke*, 18 Gr. 504; *Gotwalls v. Mulholland*, 15 C. P. 62; *Masuret v. Mitchell*, 26 Gr. 435; *Rainey v. Moody*, 6 C.P. 471; *Jones on Bailments*, pp. 64, 102; *Kent's Commentaries*, 11th ed., vol. 3, p. 781; *Story on Bailments*, 9th ed., pp. 50, 250; *Edwards on Bailments*, 2nd ed., pp. 96, 270, were referred to.

*C. Robinson*, Q.C., and *McFadden*, for the respondent. The question as to what was the actual contract between the plaintiff and Malcolm Oliver was one for the jury. It was fairly left to them, in a charge which is not complained of, and there is sufficient evidence to support their finding in favour of the plaintiff. The plaintiff in his evidence denies that there was a sale of goods for money; and Malcolm Oliver says the goods never were his, and were not to become his; he was to have the use of the stock only, and was to leave the same stock on giving up the farm, or stock of the same value, and other evidence in the case is to the same effect. In considering this question it will be necessary to take into consideration the subject matter of the contract, the position of the parties, and the surrounding circumstances, in order to ascertain the intention of the parties and the true meaning of the contract. Here, it is clear there was no intention either to buy or sell, and there is no reason in law



why the real intention, which is plain, should not be given effect to. It is obviously contrary to what both parties intended by the arrangement to hold that the effect of it was at once to transfer the property from the father to the son, and make it liable to seizure for the son's debts. In *The South Australian Ins. Co. v. Randell*, L. R. 3 P. C. at p. 110, it is said to be an incident of property in bailment, that the bailor may require its restoration. Here the father had a right at any time to put an end to the bargain, and demand restoration. The son never had the dominion over the property otherwise than subject to the father's control, and the existence of the father's right, whether exercised or not, shews that this was not a sale. The goods substituted were also by the bargain intended to become the father's, and did become his. The son, in selling or exchanging, was acting under a power given to him by the father, not as absolute owner. When the arrangement came to an end by the son giving up the farm, and leaving the father in possession thereof, and also of the goods, the property in the goods, if it had ever vested in the son, was transferred back to the father. This, and the subsequent settlement, took place before the defendant's execution, and were acquiesced in by the son, and there was a sufficient delivery and change of possession, under the circumstances, to satisfy the statute. The plaintiff is at liberty to support the judgment in his favour on this ground, and, if necessary, there should be a new trial to determine the question of delivery and possession: *Maulson v. Commercial Bank*, 17 U. C. R. 30; *Harris v. Commercial Bank*, 16 U. C. R. 437; *Foster v. Smith*, 13 U. C. R. 243; *Waldie v. Grange*, 8 C. P. 431

March 24, 1883. SPRAGGE, C. J. O.—It appears to be clear from the evidence that upon the agreement for lease between the plaintiff and his son Malcolm, the execution debtor, Malcolm was to be at liberty to sell stock and farming implements, from time to time, the only limitation being that he was to keep sufficient on the farm for the work of the farm; and at the end of the term have sufficient in value

equal to the value of those which he took at its commencement; composed of those received by him, or of others acquired to replace them, in the event of their being parted with by Malcolm.

It has been held by a majority in the Court below, that upon this agreement the property in the chattels remained in the plaintiff—by the dissentient Judge, Mr. Justice Osler, that the property in the goods passed to Malcolm.

The question has been more discussed in the American Courts than in England; those Courts, however, basing their decision mainly upon the law stated by Sir William Jones, called in *Paige's Reports*, (9 Paige 314 *n.*), “the great oracle of the law of bailments,” and who is quoted as authority in all, or nearly all, of the cases upon the subject. The note to which I have referred is to the case of *Carpenter v. Griffin*, 9 Paige, where a farm was let together with cows and sheep then upon it, the lease containing this clause: “Cows of equal age and quality to be returned at the end of the said term, and also the sheep.” The cows were seized in execution by a creditor of the lessee, during the term. Chancellor Walworth held the case ‘not distinguishable from *Hurd v. West*, in the Supreme Court of New York, 7 Cowen 752, and added his own opinion thus: “Applying the well-established principles of law to the written contract between the landlord and his tenant in this case, I am bound to decide that the legal title to the cows and sheep put on the farm at the commencement of the term passed to the tenant, so as to give him the right to dispose of them, and to subject them to seizure and sale for his debts.” It was observed in that case, and the same may be said in this, that “it is unquestionably competent for the landlord in cases of this description to make a contract which will secure to him an equitable lien upon the property put upon the farm for the use of the tenant, or on the proceeds thereof, so far as the same can be traced and identified;” but in the absence of any stipulation on the subject, it would seem to be the law that the property passes to the tenant. There was such a stipulation in *Armington v. Houston*, 38

Verm. 448, and in *Sargent v. Metcalfe*, 5 Gray 306, and its validity was sustained by the Courts; and it has, I apprehend, been upon the same principle that the cases upon the provisional sale of pianos have been decided in the Courts of this Province. The cases of *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101, and *Holme v. Brunskill*, 3 Q. B. D. 495, are decisions in the English Courts in the same direction as *Hurd v. West*, and *Carpenter v. Griffin*, in the American Courts, to which I have referred. I have examined the cases referred to in the Court below in the judgment of the learned Chief Justice, but they do not, as I read them, impugn the rule laid down by Sir W. Jones, cited in the judgment of Osler, J., and recognized as law in the cases that I have referred to.

There is, however, a distinction between these cases and the case before us, which is, I think, a material one. The agreement, which was made in June, 1876, was for five years, determinable at the will of either party at any time within the five years. It was formally determined by the written paper of 12th March, 1879, signed by and under the seal of Malcolm Oliver, surrendering to the lessor all right and interest in the farm and growing crops, in consideration of the rent in arrear, \$300. There had been a virtual termination of the tenancy in the previous January. Malcolm at that date left the place. He had been unsuccessful as a farmer; there had been successive failures of crops; he had become dissatisfied; he said he could make more money elsewhere, and that his father might have what there was upon the place. His father upon this took the place off of his hands, and according to the evidence, from that time on, managed the place himself. The inference from the evidence is, that Malcolm in January definitely and absolutely abandoned the place, and as far as he could surrendered it to his father, and that his father accepted the surrender. Malcolm returned in March, and executed the paper of the 12th. On the 4th of April he signed another paper purporting to be a receipt for \$340, and expressed to be full value for what interest he had in all "stock and farming implements,

ploughs, harrows, cultivators, waggons, sleighs, cutters, buggies," on the farm. At this time, and I suppose the same was the case in January, the stock and implements on the place were of less value than were those received by Malcolm when he took the place. Somewhat over half of what he received originally was still on the place; the rest that was there had been acquired by Malcolm, to replace what he had parted with.

The seizure under the defendant's execution was subsequent to all this, being in October, 1879; some six months after the second paper.

The question arises, in whom was the property in these chattels after the execution of these documents. It is not really necessary to go back to what took place in January; but how stood the property on and after the 4th of April? The paper of that date reads as if there had been a sale of Malcolm's interest in the chattels: and rather imports a sale at some previous time "for what interest I have had." I gather from the evidence that the parties, apprehending that there might be trouble about these chattels, intended to put into shape what they had previously agreed to in regard to them. Assuming that up to that date the legal property was in Malcolm, which, however, I think at least doubtful, it seems to me to have passed upon the execution of that instrument to the plaintiff. The paper acknowledges payment of the purchase-money of the chattels. No formal conveyance was necessary. Mr. Benjamin, in his book on Sales of Personal Property, 3rd ed., p. 270, takes from Sheppard's Touchstone the common law rules on the subject: "If one sell me his house, or any other thing for money, or other valuable consideration; and first the same thing is to be delivered to me at a day certain, and by our agreement a day is set forth for the payment of the money; or secondly, all; or thirdly part of the money is paid in hand; or fourthly, I give earnest money, albeit it be but a penny, to the seller; or, lastly, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these cases there is a good bargain and sale of the thing to alter the property thereof." Here there

was a valuable consideration ; and, apart from the Bills of Sale Act at any rate, there was all that was necessary to constitute a valid transfer of property.

I incline to think further, that there was nothing upon which an execution against the goods of Malcolm could operate from the day when the tenancy was determined. It may not have been formally determined in January ; but on the 12th of March there was a formal surrender of the term. It is true the chattels are not mentioned in the paper of that date, but the *right of property* in the chattels then on the place was clearly in the plaintiff. No beneficial interest remained in Malcolm, and a sheriff selling only the interest of Malcolm in the chattels, nothing would have passed to a purchaser. The right of property, if not the legal title, was in the plaintiff, and the defendant's execution was not entitled to prevail. This is the state of things put by Chancellor Walworth, hypothetically, in *Carpenter v. Griffin*. He says : " As to the eight cows remaining of those which were put on to the farm at the commencement of the term, and those which have been bought with the avails of cows or sheep which have since been sold by the tenant, there might have been some room for resisting the claim of a creditor to a preference by virtue of his execution if the term had expired before the property was levied on, so as to have entitled the complainant to an immediate return of the cows and sheep mentioned in the lease according to the stipulation therein contained." This is cautiously expressed, but is sufficient to shew that the Court did not intend to decide that the right of property after the end of the tenancy continued in the tenant.

In *Hurd v. West*, 7 Cowen 752, the Court puts what the learned Judge thought were probably the real facts of the case : " It was, however, competent for Daniel Dayton to return ; and for the defendant below to accept any sheep in satisfaction of the contract. \* \* \* It cannot be doubted, that if in fact Daniel Dayton returned the sheep in question to the defendant below, or delivered them on the farm to Gideon Dayton as the property of the defendant below, and he accepted that

act by accepting the delivery, the right of property in the defendant below became perfect;" another expression of opinion in the same direction; and if it be good law, as I think it is, the right of property became perfect in the plaintiff as early as January, 1879..

I take it that the subsequent acts may be accounted for without imputing bad faith to the parties, or untruthfulness to the witnesses. The parties may well be excused if they assumed that what they had done by verbal agreement could be undone by the same means; but having afterwards taken legal advice, they thought it best to carry out their agreement in a more formal manner. It was indeed probably their idea that the property in the chattels never passed to Malcolm at all, but remained throughout in the father; and if so, this may help further to explain their conduct and dealings.

I understand the question upon this issue to be, not whether the legal title to these chattels is shewn to have been perfected in the plaintiff by transfer from Malcolm, but broadly, whether the defendant's execution is to be preferred to the right of property shewn to be in the plaintiff. In my opinion, the legal title is shewn to be in the plaintiff; but I think that shewing the right of property out of Malcolm, and in the plaintiff, is sufficient.

It remains to be considered whether the Bills of Sale Act applies to this case. I think it does not, either literally or in its spirit. There was really no *sale* either in January, March, or April. In January, by the act of the parties the right of property in these chattels reverted to the plaintiff. This was done more formally in March—the right of property in Malcolm ceasing with the term. The document of April is sufficient to operate as a sale, but is not in terms or otherwise necessarily a sale. It was in legal effect a parting with any interest that Malcolm may have had in the chattels. It lacked one at least of the essential elements of a sale. Sir Wm. Blackstone defines a sale to be a transmutation of property from one man to another in consideration of some price (2 Bl. 446). Mr. Benjamin, (p. 2,) states as one essen-

tial element a transfer of the *absolute or general property* in the thing sold, adding, "a transfer of the special property is not a sale of the thing." All right of property ceased in Malcolm when the term ceased, and, according to *Hurd v. West*, became perfect in the plaintiff. The dealing that operated a termination of the tenancy was not a sale, nor intended by either party to be a sale; and what took place afterwards was a mere carrying out of what had previously taken place, and was in no proper sense of the term a sale. The real character of what was done in January and subsequently, was the annulling of what had been done in June, 1876, and the reinstating of the parties in their former position.

But even if what was done in January, 1879, and subsequently, could be regarded as a sale, I think that what is required by the Bills of Sale Act was complied with; that there was "an immediate delivery, and followed by an actual and continued change of possession." Up to the time of his giving up possession of the farm, and of the chattels upon it, Malcolm had managed and controlled both; from and after that time both were managed and controlled by the father. The change was not so conspicuous to the eye of the world as it would be in the case of the actual removal of a chattel sold, but it was an actual change of possession nevertheless; and as much so as the nature of the case would admit. Malcolm's possession consisted in the use and management of these chattels up to the time of his giving them up. After that the plaintiff used them and managed them. His possession was therefore of the same character as that of Malcolm had been. If Malcolm was in possession, so afterwards was the plaintiff; and this could not be without an actual change of possession; and there is no doubt that possession in the father continued; Malcolm never resumed possession or management. Upon these facts of change and continued change of possession, we have the evidence of the plaintiff and of Malcolm, corroborated by the evidence of Thomas Oliver, and of William Martin and James Graham; and there is no evidence the other way.

We are unable to see how the question arising upon these facts was dealt with by the jury. In one part of his charge the learned Judge told the jury that in fact the farm was given up within the five years. In another passage he says: "The father relies upon having had a transfer of them, (the chattels,) in February by a paper." The paper of April, or possibly that of March, must be meant. "I don't think that would have the effect of preventing an execution against the property of the son. There was not any continued change of possession. The son continued there ever since, just in the same way he had lived before he went off to Hamilton, at the time he went away." This differs from the first passage that I have quoted so much, that I infer that there is some error in the report of the charge.

We are told now, at the hearing of the appeal, by counsel for the appellant, that the point of re-sale by the son to the father was virtually given up at the trial; that the question of re-transfer of the chattels was not asked to be submitted to the jury. This is not exactly agreed to by counsel for the respondent; but they do admit that at the trial the counsel for the plaintiff felt so strong upon the first question in the cause, that the agreement had not in law the effect of transferring the property in the chattels to the son, that the question of re-transfer was not put to the jury.

It appears however to have gone to the jury, but with an expression of opinion on the part of the learned Judge against it. Still, whether they intended to find one way or the other upon it, or to found their verdict upon the original agreement, and that only, we have no means of knowing. I think that under the circumstances the only way of getting at a satisfactory solution of the case is, by directing a new trial, and I think the costs, including the costs of appeal, should abide the event.

There are three items as to which there seems to me to have been some misconception. The items are a buggy, a cutter, and a set of single harness. At the trial the jury were told in effect that whatever their finding might be as to the bulk of the items in question, their verdict should be for



the defendant for the value of these three items ; and when the jury included these items in their verdict for the plaintiff, the learned Judge noted the verdict as perverse in regard to them ; and as to these items the same view was taken in term of the finding upon those items.

It is, at any rate, a point that may easily be cleared up upon another trial of the case.

BURTON, J. A.—I think that the legal effect of the transaction of June, 1876, was to vest the absolute property in the chattels in the son, the execution debtor, whose agreement with his father would be satisfied by returning, at the expiration of the term, articles of a like character and value, and the question really turns upon whether the alleged re-transfer to the father was void under the Bills of Sale Act, there being no bill of sale filed.

The main contest at the trial was as to the nature and effect of the agreement of June, and the question of whether there was such an immediate delivery, accompanied by an actual and continued change of possession as required by the statute, which was essentially a question for the jury, does not appear to have been considered by them.

I think this case should go back to a jury for the purpose of considering that question, and would have been necessary at all events as to those articles which were obviously the property of the execution debtor, and as to which the verdict was perverse.

I am of opinion that the appeal should be allowed, and the rule for a new trial made absolute, with costs to abide the event.

MORRISON, J.A., concurred.

ARMOUR, J. was absent when judgment was delivered.

## IN RE HALL.

*Extradition—Appeal from High Court—Court of Appeal equally divided, effect of—Res judicata—Habeas Corpus.*

The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice, which on appeal to this Court was affirmed, the Court being equally divided, (ante p. 31.) A second writ of *habeas corpus* was thereupon obtained, and the prisoner brought before the Common Pleas Division, when he was again remanded, whereupon he again appealed to this Court, which appeal was dismissed with costs, as under such circumstances a second appeal could not be entertained.

*Per* HAGARTY, C. J., (SPRAGGE, C. J. O. concurring). The prisoner having already appealed to this Court from the judgment of the Chancery Division, he must abide by the legal result of such appeal, viz., the dismissal of it and consequent affirmance of the decision appealed from, and he could not again ask the interference of this Court on the same state of facts.

*Per* BURTON and PATTERSON, JJ. A. The grounds for the technical rule of practice of the House of Lords on an equal division have no existence in other appellate tribunals, although in the particular case, the appellate Court is the Court of last resort. The effect of an equal division in this Court, as in a Court of first instance, is simply that the rule or motion drops or the appeal is dismissed, and the judgment below remains undisturbed, but is not considered as a binding authority.

The Act 29-30 Vict. ch. 45, apparently substituted the right of appeal in *habeas corpus* cases for successive applications from Court to Court.

*Per* PATTERSON, J. A. By the effect of the Judicature Act, a decision of any one division is a decision of the High Court, this matter had therefore been already disposed of on the former appeal.

After the dismissal of the appeal by the prisoner from the judgment of the Divisional Court of the Chancery Division, (Ante. p. 31,) the prisoner moved for and obtained a second writ of *habeas corpus* returnable before the Divisional Court of the Common Pleas Division. After hearing counsel upon the return of that writ the Common Pleas Division quashed the writ and remanded the prisoner for extradition: 32 C. P. 498. Thereupon the prisoner appealed to this Court, and the appeal came on to be heard on the 28th of December, 1882. \*

*Bethune*, Q. C., for the appellant.

*Fenton*, contra.

\**Present.*—SPRAGGE, C.J.O., HAGARTY, C.J., BURTON and PATTERSON, JJ. A.

January 17, 1883. PATTERSON, J. A.—This appeal is from the judgment of a Divisional Court of the Common Pleas Division, quashing a writ of *habeas corpus* which had been issued returnable before the Divisional Court under an order of Mr. Justice Cameron.

The application for the writ was grounded upon the same facts which had been the subject of adjudication by the Divisional Court of the Chancery Division, when that Court remanded the prisoner to custody upon the original warrant, and which had been before this Court on the appeal from that decision, which appeal was dismissed in consequence of an equal division of opinion amongst the Judges before whom it was heard, upon the question on which the claim for the extradition of the prisoner turned, namely, whether the acts proved against him constituted the crime of forgery.

In the Common Pleas Division it was held that the writ had been improvidently issued, because the matter in controversy had been decided, and the legality of the detention of the prisoner established in the previous proceedings. Therefore the writ was quashed without any reconsideration of the question of forgery.

The questions raised by the appeal are to a great extent novel ones, and owing to the difference between our statute R. S. O. ch. 70, and the Imperial Act 56 Geo. III. ch. 100, many of whose provisions it adopts, we have to decide them without very direct assistance from English cases.

My consideration of the matter has not satisfied me that the conclusion of the Court below was wrong, and I am therefore of opinion that we should dismiss the appeal.

At the same time I desire to guard myself from being understood to assent to all the reasoning of the learned Judges who delivered judgments in that Court; and for that reason I shall state as briefly as I can the views which at present influence me.

I am not satisfied that the effect of a decision of the House of Lords, whether the result of a unanimous vote, or pronounced in accordance with the rule *semper*

*præsumitur pro negante* when there happens to be an equal division of opinions, can properly be taken as a criterion of the effect of a judgment of this Court.

By an ancient rule of the House, the question put is: "Shall this appeal be reversed?" and if upon that question, the votes are equal, the rule *semper præsumitur pro negante* prevails, and the decision of the Court below remains undisturbed. So it is with us, and as far as I know with every Appellate Court. Not that a formal motion is put and a formal vote taken, as in the House of Lords, where the form of a debate is preserved; but essentially the same thing of necessity happens. The appellant impugns the decision of the Court below; and unless he can obtain a majority of opinions in his favour he fails, and the decision remains undisturbed.

But when the analogy is pushed farther than this, and it is said that the House of Lords cannot decide a question of law contrary to a former decision of its own; and that its judgment dismissing an appeal because votes are equally divided amounts to an affirmance of the law decided in the Court below, and binds the House just as it would be bound if the vote had been unanimous, and that in both of these particulars the same rule applies to this Court, I am not prepared to assent.

I am not convinced that, as to the House of Lords itself, the rule goes to the extent asserted; but assuming it to do so, I do not understand it to be founded upon a principle which applies to this Court.

The case of *Beamish v. Beamish*, 9 H. L. C. 274, 8 Jur. N. S. 770, in which the House considered itself governed by *Regina v. Millis*, 10 Cl. & F. 534, which had been decided upon an equality of votes, is undoubtedly a strong authority for the position that such a decision of that House affirms the law held in the Court appealed from, and must be followed by the House itself. The reason for the last proposition is thus given by Lord Campbell in his judgment: "But is my duty to say that your Lordships are bound by this decision as much as if it had been pro-

nounced *nemine dissente*, and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially as the last and Supreme Court of Appeal for this Empire, must be taken for law until altered by an Act of Parliament agreed to by the Commons and the Crown as well as by your Lordships. The law laid down as your *ratio decidendi* being already clearly binding upon all inferior tribunals and on all the rest of the Queen's subjects, if it were not considered equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its separate authority."

The same noble and learned Lord had, ten years earlier enunciated the same views in *Bright v. Hutton*, 3 H. L. C. 341.

The reasoning may not seem entirely satisfactory, because if the House happened erroneously to expound the law, and by its decision in effect to alter the law, that would equally be an act of legislation; and a subsequent decision declaring the first to have been an error would not of necessity be legislation. But whether the reasoning be sound or unsound, the doctrine is, I think, inapplicable to this Court.

Speaking, for the moment, only of the *ratio decidendi* in one case necessarily governing other cases involving similar questions, and not of the effect of an adjudication between particular litigants, it is clear that no such effect can be attributed to our decision as that which Lord Campbell attributes to the decision of the House of Lords. Without any need of legislation, our decisions may at any time be declared not to be law by Courts by whose decisions we are bound as the Supreme Court of Canada, or the Judicial Committee of the Privy Council. But I do not find that the stringent rule propounded by Lord Campbell, and apparently acted upon by the other learned Lords who took part in *Beamish v. Beamish*, is always admitted to exist.

Thus, Lord St. Leonards, who presided as Lord Chan-

cellor at the hearing of *Bright v. Hutton*, 3 H. L. C. 341, is reported to have said (p. 388): "At the same time I should venture to state as my opinion that, although you are bound by your own decision as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you may lay down, if upon a subsequent occasion you should find reason to differ from that rule: that is, that this House, like every Court of Justice, possesses an inherent power to correct an error into which it may have fallen." Again, in *Wilson v. Wilson*, 5 H. L. C. 49, Lord St. Leonards said (p. 62): "It has been doubted by a noble and learned Lord who is not now present (referring either to Lord Campbell's remarks in *Bright v. Hutton*, or to something said by Lord Truro in *Tommey v. White*, 3 H. L. C. 68), whether this House can correct any error which it has committed. I confess, my Lords, I have always entertained the opinion that, in the particular case, you cannot correct the error. It is settled. Nothing but an Act of Parliament can reverse it. But I certainly hold that this House has the same power that every other judicial tribunal has to correct an error (if it has fallen into one), in subsequently applying the law to other cases." And Lord Brougham said (p. 71): "I entirely agree with what my noble and learned friend has said as to the impossibility of anything but an Act of Parliament altering any judgment of this House that has once been pronounced in a cause. It is a totally different thing, and is a *questio vexata*, how far we may or may not disregard any one of our own judgments when applied to another cause."

The discussion in *Bright v. Hutton* arose from the circumstance that the law acted upon by the House was different from what had been held on the same subject in *Hutton v. Upfill*, 2 H. L. C. 674, which case was, however, distinguished from the other, on the ground that it had involved a question of fact as well as the question of law.

In *Tommey v. White*, 3 H. L. C. 68, the inability of the House to rehear a 'case' in which a final judgment had

been pronounced was affirmed by Lord Chancellor Truro and Lord Brougham ; but another case is mentioned in a note to that report in which the House of Lords ordered the clerk to amend the judgment of the House by striking out an order to examine the parties, as it appeared that two of the parties were dead, which was unknown to the House when the order was made.

When the House of Lords, on the principle *semper præsumitur pro negante*, dismisses an appeal, the judgment of the Court below is, in form, affirmed, as appears from some of the cases I have referred to, and from *Baker v. Lee*, 8 H. L. C. 512, and others cited at the bar or in the judgments now in appeal. I may add *Anderson v. Morice*, L. R. 1 App. Cas. 750, where, while the judgment was affirmed, no costs were given.

Having regard to these cases, we may, in my judgment, very properly hesitate before taking it to be certain that, even as regards the House of Lords itself, a judgment for the respondent given because the appellant has failed to secure a majority of opinions in his favour, the votes being equally divided, has any binding effect beyond the particular case ; and there are still stronger reasons for hesitation before holding that any such effect attends the judgments of inferior appellate tribunals.

In Courts of first instance when an equal division of opinion occurred, I believe there never was any doubt that no judgment could be given. The motion, whatever it was, dropped. In *Dansey v. Richardson*, 3 E. & B. 722, Lord Campbell pointed out the difference in this respect between those Courts and the House of Lords. "In the House of Lords," he said, "when the Lords are equally divided, the respondent is successful, for the decision in his favour is made on the principle *semper præsumitur pro negante*. But when this Court is equally divided on a rule there is no decision and no successful party."

The practice of Courts of first instance in cases of equal division, for one Judge to withdraw his opinion to enable the Court to give a judgment from which an appeal could

be brought, is well known. The question is whether the same principle did not apply to such Courts as the Exchequer Chamber.

In *Tidd's Practice*, 9th ed., (1828) p. 1178, it is said: "The judgment in error, unless the Court are equally divided in opinion, is to affirm, or to recall, or reverse the former judgment," &c., a passage which is repeated in *Tidd's New Practice*, (1837) at p. 615. In the older work this passage is followed by another which does not re-appear in the new Practice. I do not suppose its omission implies any intention to withdraw it as of doubtful correctness, notwithstanding the author's statement in his preface that particular attention has been paid in the new Practice to several important practical subjects, amongst which he enumerates writs of error and the proceedings thereon. The following is the passage: "When the Court of King's Bench are equally divided in opinion upon a writ of error, it seems there can be no rule for affirming or reversing the judgment without consent. \* \* But in the Exchequer Chamber, it is the practice, upon a division, to affirm the judgment, as was done in the case of *Deighton v. Greenville*, 1 Show. 36; *Cruise on Fines*, 222. And so is the practice in the House of Lords, which depends on their mode of putting the question to reverse the judgment, a majority being required to reverse it: 1 Str. 383."

I do not find from the report of *Deighton v. Greenville* in Shower what was the form of the judgment. In Comberbach there is a long report of the case in the King's Bench, and of the judgment of that Court delivered in Easter Term, 4 Jac. 2, and it is noted that the case was argued in error: Mich. 1 Will. & Mar. to which the reporter adds: "*Quære*, what judgment was given thereupon?"

Looking at the more modern cases to which we have been referred, we find in the report of *Hickman v. Cox*, 3 C. B. N. S., at p. 568, the statement that "the Court of Appeal being thus equally divided in opinion, the appeal failed, and the judgment of the Court of Common Pleas so far remained undisturbed." Then the reporter adds that he



had been informed that the question whether under the circumstances an appeal to the House of Lords was warranted by statute (17 & 18 Vict. ch. 125, secs. 34 and 35; C. S. U. C. ch. 13, secs. 23 and 24) was discussed before Bramwell, B., at Chambers, and that the learned Baron, after full deliberation, decided that it was. This is certainly a case in which it was not assumed that an equal division of opinion was equivalent to a judgment affirming the decision of the Court below.

In other reports we occasionally find a statement by the reporter, in the course of his narrative, that a judgment was affirmed, or stood affirmed, or simply that an appeal was dismissed. I doubt the propriety of placing much reliance on such expressions, when the matter was not particularly brought to the attention of the reporter by being the subject of discussion. We are often warned of the necessity for caution in this particular, especially in the case of our Supreme Court reports, where the reporter may not be familiar with the practice or procedure of the Provincial Courts. Thus, to take one example, the report of *Gray v. Richford*, 2 S. C. 431, a case in which (as correctly stated at pp. 435-6) this Court had been equally divided in opinion, whereupon the appeal from the Court of Common Pleas had been dismissed, the report begins by stating that this Court had declared that the rule *nisi* for a new trial in the Court of Common Pleas be made absolute. Still I may refer *quantum valeant* to the reports of *Mollett v. Robinson*, which case has been cited to us, in the Exchequer Chamber, in L. R. 7 C. P. 120, and 7 H. L. 802,

In 7 C. P. it is said that the Court being equally divided, the judgment of the Court below discharging the rule was affirmed while the statement of the same matter by the reporter in the House of Lords is, "this was an appeal against a judgment given in the Court of Common Pleas for the plaintiffs, now the respondents, on a case stated, which judgment, through an equal division of opinion among the Judges of the Exchequer Chamber had stood

affirmed." And again, at the end, the note is "judgment of the Court of Exchequer Chamber reversed, and judgment entered for the defendant."

These different modes of stating the same thing are all consistent with the understanding that there was a formal judgment of the Exchequer Chamber dismissing the appeal, or even in terms affirming the judgment, as the formal expression of what was the real result, viz., that the judgment of the Common Pleas stood affirmed or undisturbed, because no adjudication had been made by the appellate Court upon the controversy.

We find a similar variety of statement in the reports of *Hickman v. Cox*. What appears as a reporter's note in the regular report, from which I have quoted, as to the judgment remaining undisturbed, formed in fact the conclusion of the written judgment which was read by Coleridge, J., as the judgment of himself and of Erle and Crompton, JJ., as it is given in 4 Jur. N. S. at pp. 92, 93. His words there are: "For these reasons I think the judgment ought to be affirmed; and as it appears that the Court is equally divided, the judgment which was delivered in the Court below must stand affirmed"

The passage was doubtless recast into the shape in which it appears in the regular report either by or with the assent of the learned Judge himself.

Another instance, very much to the purpose, is *Jordan v. Adams*, 9 C. B. N. S. 505, where we are told that the Court of Exchequer Chamber being equally divided, the Lord Chief Justice, Sir A. E. Cockburn, intimated that if the parties wished to carry the case farther, one of its members would withdraw his opinion so that the judgment of the Court of Common Pleas might be affirmed.

The case before us does not require that we should define the precise effect as a precedent of one of our own judgments which dismisses an appeal by reason of the Court being equally divided in opinion. My own impression at present is that it is not to be regarded as any adjudication upon the question of law which may be in controversy, and

that it is operative only as disposing of the particular appeal.

I have gone so far into the subject for the purpose of pointing out that I do not assent to the proposition that a judgment which is binding upon this Court, or upon any other Court, in any sense beyond the disposal of the former appeal in this matter, has been pronounced by this Court.

I have thought it important to go thus far, because, if the larger effect of the judgment were conceded, it should be taken by all our Courts of criminal jurisdiction as deciding that acts like those charged against the prisoner, when done in similar circumstances, constitute the crime of forgery. That may or may not be their legal effect, but so far I take it that this Court has not so decided.

The propriety of the action of the Court below in quashing the writ and remanding the prisoner to custody does not turn upon the doctrines I have discussed, as I apprehend it. It may depend upon the consideration to which the learned Chief Justice in the Court below calls attention, that whatever action was taken in this Court was in relation to the same imprisonment and the same complaint which are now in question; but I am not sure that, even if no previous appeal had been taken to this Court, the prisoner would not have been precluded from insisting upon the validity of the writ with which we are now concerned.

Something has been said as to whether the writ issued by Mr. Justice Cameron was issued under the common law powers of the Court, or by virtue of the Statute 31 Car. 2 ch. 2. I agree with the learned Chief Justice of the Common Pleas, that it was under the common law powers. The statute of Charles applied only when the detention was for some criminal or supposed criminal matter, other than treason or felony, and it provided only for the admission of the prisoner to bail to appear for trial, not authorizing his discharge in any other way: *Ex parte Bessett*, 6 Q. B. 481, which is cited by the learned Chief Justice, decided that the commitment in that case for the

purpose of extradition was not of the class touched by the statute of Charles. The charge there was for a fraud under the bankruptcy laws of France. The present charge is for what is recognized as a crime, and although charged in the information and warrant of commitment as a felony, would have been, if committed here, only a misdemeanor, as I believe all the Judges who have dealt with the facts agree. Therefore, *Ex parte Bessett*, may not be decisive as to the present case being outside of the statute. Other cases, however, reach the whole question by shewing that, to be within the statute, the prisoner must be in custody for a crime for which he may be brought to trial in this country. Thus in *Ex parte Beeching*, 4 B. & C. 136. Abbott, C. J., said: "The object of the Habeas Corpus Act, 31 Car. 2 ch. 2, was to provide against delays in bringing persons to trial who were committed for criminal matter. The person making this return is not a person to whom the prisoners have been committed for any such matter. The *habeas corpus* in this case was, therefore, a writ issuing by virtue of the common law, and I think that under the circumstances the 56 Geo. III. ch. 100, sec. 4, gives the prisoners the right to controvert the truth of the return."

In *Cobbett v. Slowman*, 9 Ex. 633, it is said: "The statute of 31 Car. 2 ch. 2 applies only to cases where the person is in prison upon some charge for which he is liable to be tried, and does not extend to process issued in a civil suit."

The case of *Dominus Rex v. Macintosh*, 1 Str. 308, arose under the seventh section of the statute, which enables persons committed for treason or felony to present their prayer to be brought to trial at the next term or let to bail. The note of the case reads thus: "East. 6 Geo. He was committed for treason done in Scotland, and the first week in this term applied to enter his prayer upon the Habeas Corpus Act. *Sed per cur*: We cannot do it, for that prayer is only to be tried, and we cannot try a treason committed in Scotland."

It seems, however, immaterial whether the application would have lain under the statute of Charles, or only at common law, before the passing of the Statute of Canada 29 & 30 Vict. ch. 45, because that statute, unlike the Imperial Statute 56 Geo. III. ch. 100, applies to commitments for criminal matters as well as to imprisonment for any other cause, except under civil process or under conviction.

I think the present appeal has to be decided upon the effect of the Statute 29 & 30 Vict. ch. 45, which is now represented by ch. 70 of R. S. O. I shall refer to the Act as arranged in the Revised Statutes.

In its general provisions it follows the Act of 56 Geo. III. ch. 100, but differs from that statute in some important particulars, the principal points of difference being its extension to cases of restraint for criminal or supposed criminal matter, which are excepted from the operation of the first section of the Imperial Act, and the provision for an appeal.

By the first section, any of the Judges of either of the Superior Courts of Law or Equity may, and they are required, upon complaint made to them by or on behalf of the person in custody, if it appears by affidavit or affirmation that there is a probable and reasonable ground for such complaint, to award *in vacation time* a writ of *habeas corpus ad subjiciendum*, under the seal of the Court wherein the application is made, returnable immediately before the Judge so awarding the same, or before *any Judge in Chambers for the time being*.

Sections 2 and 3 provide for enforcing obedience to the writ.

Under sec. 4, if the writ is awarded so late in the vacation by a Judge, that in his opinion obedience thereto cannot conveniently be paid during such vacation, it shall *at his discretion* be made returnable in the Court wherein the application is made, at a day certain in term; and the Court shall proceed thereupon, &c.

Section 5 enables the Court, if the writ is awarded late

in term, to make it returnable at a day certain in the next vacation, before *a Judge in Chambers*.

These provisions are essentially the same as in the Imperial Act, sec. 2. It will be observed that the statutes do not in terms confer on the Courts in *banc* power to issue writs of *habeas corpus*. That power already existed at common law. The new power is that which is conferred upon the individual Judges in vacation.\* Sections 6 and 7 give a right, which did not before exist, to controvert the truth of the return to the writ; section 8 provides for bringing up papers by *certiorari*; and section 9 proceeds to give an appeal to this Court, "in case any person confined or restrained of his liberty, as aforesaid, is brought before the Court in term time upon a writ of *habeas corpus*, and is remanded to custody again upon the original order or warrant of commitment, or by virtue of any warrant, order or rule of such Court."

The right of appeal thus given was a step in advance of the Imperial legislation. The express enactment gives the appeal only from the decision of the full Court, but it cannot be supposed that when a decision of the full Court was made subject to be reviewed, it was understood or intended that the decision of a single Judge was not to be open to review. Having regard to this consideration, and to the use of the phrase "Judge in Chambers for the time being," in the first section, and "Judge in Chambers" in

\*In the House of Lords on May 22nd, 1816, the Marquis of Lansdowne moving the committal of the bill for better securing the liberty of the subject, said: "The object was to extend the benefit of the *habeas corpus* to all persons and to all times. This bill would enable the Judges to issue the writ in vacation, and to inquire into the truth of facts alleged in the return, and apply the adequate remedy by holding to bail at discretion. \* \* From the want of power to remedy abuses during the vacation, many had probably occurred which had never been brought to notice."

Lord Ellenborough said: "At present the opinion was that each individual Judge had not the power of liberating in the vacation; and he had no objection to agree to the extension of the remedy, so far as to empower individual Judges to liberate where the imprisonment appeared questionable." *Hansard's Parliamentary Debates*, vol. 34, col. 679 and 680.

the fifth section, to designate the person who may proceed upon the writ, the conclusion is, I think, warranted that the Legislature intended that a prisoner who was remanded by the decision either of a single Judge or of a Court should have the same right which a suitor in an ordinary action had to have the decision reviewed. It was not intended to allow him to go direct from a Judge in Chambers to the Court of Appeal; therefore the appeal is given only from the decision of the full Court, or as it is expressed, from the Court in term. The procedure in an ordinary action, as it existed in 1866, when the Act was passed, is thus applied to appeals under this statute. Without the express enactment there would have been no right of appeal. The ordinary practice of the Courts did not reach so far as to make the express enactment unnecessary. But, under the ordinary practice, a decision of a Judge in Chambers could always be reviewed by the Court in which the matter was pending. The assumption by the Legislature, that this practice would apply to decisions by a Judge in Chambers under this Act is, in my opinion, involved in the express concession of an appeal from the full Court. To hold otherwise would be to admit the anomaly of an appeal from the superior tribunal while there was none from the inferior one.

I do not think there is anything against this view in the fact that the appeal is given only in case the prisoner *is brought before the Court upon a writ of habeas corpus*, although that phrase would seem rather to refer to an original adjudication by the Court upon the return of a writ returnable before the Court itself, than to an appeal from the decision of a Judge upon a return made before him. It is a matter of procedure only. On a remand by the Judge the prisoner is returned to the original custody, unless there is some provision to the contrary; and perhaps the issue of a fresh writ by the Court in order to bring up the prisoner, for the purpose of reviewing the judgment by which he was remanded, may be a convenient enough proceeding. But power is given to the Court of

Appeal, by section 11, to make rules of practice in reference to the proceedings on writs of *habeas corpus*, as to that Court may seem necessary or expedient, and under this power no difficulty need be feared in being able to provide, if necessary, for the production of the prisoner before the Court in *banc* upon the original writ.

When an appeal is given from the Court in term to the Court of Appeal, the important consequence naturally suggests itself that there can be no longer the right to apply for a writ of *habeas corpus* to one Court after another. By the power to appeal, provision is made for obtaining a decision which, if it determines a question of law, is binding upon all Courts of first instance; and which, even if it is merely the dismissal of the appeal by reason of an equal division of opinion, is at all events conclusive in favour of the particular judgment. There can be no further appeal from it. The intention of the legislature evidently was that the remedy should be worked out by the machinery of the appeal, and that there should be no second writ allowed. It is the same thing, whether the writ is returnable before a Judge in Chambers or before the Court. In the latter case, the appeal is given in express terms. In the former there is a resort by the ordinary steps, first, to the full Court, and thence to the Court of Appeal.

But in addition to the effect which the Act of 1866 thus had, we have now to consider the changes made by the Ontario Judicature Act, 1881.

By section 9 of that Act it is declared that the High Court of Justice, subject as in the Act mentioned, shall have the jurisdiction which was vested in or capable of being exercised by the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas, and Courts of Assize, Oyer and Terminer and Gaol Delivery, and shall be deemed to be and shall be a continuation of the said Courts respectively (subject to the provisions of the Act) under the name of the High Court of Justice; and that jurisdiction, it is declared, shall include the jurisdiction



which was vested in, or capable of being exercised by all or any one or more of the Judges of the said Courts respectively, sitting in Court, or in Chambers, or elsewhere, when acting as Judges or a Judge in pursuance of any statute or law; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction.

Section 10 enacts that the several jurisdictions vested in the High Court of Justice shall cease to be exercised except in the name of the High Court of Justice as provided by the Act, save as otherwise in the Act provided.

There is therefore no longer the possibility of going from Court to Court, as all the proceedings are in the same Court, viz., the High Court of Justice. There have been three writs of *habeas corpus* issued at the instance of this prisoner, not out of different Courts, but all out of the High Court of Justice, sealed with the seal of that Court, and tested in the name of its president. The statute passed last year, 45 Vict. ch. 6, making some provisions respecting the delivery of judgments, correctly speaks of "appeals from the High Court."

The English Judicature Act, 1873, gave a right of appeal in terms wide enough to include cases of *habeas corpus*. Our Judicature Act, though in some particulars extending, and in others restricting, the rights of appeal which existed under R. S. O. ch. 38, and under some other statutes, does not touch the subject of appeals in cases like the present. The two Judicature Acts however agree in making one Court out of several. In England there are at least two reported cases in which appeals have been entertained in matters of *habeas corpus*. One was *Dale's Case*, 6 Q. B. D. 376, in which the Court of Appeal discharged the prisoner. The other is the case of *Regina v. Weil*, 9 Q. B. D. 701, in which it was held that the prisoner was lawfully in custody for extradition. A doubt was expressed by the Judges whether the Court of Appeal had jurisdiction in that case, but that doubt arose from the question whether the charge should not be treated as a criminal charge of

the class which the 47th section of the Act of 1873 assigned to another jurisdiction.

Referring to the provisions of the Judicature Act, 1873, respecting appeals, Messrs Lely and Foulkes in their treatise on the Judicature Acts, remark (p. 12) that section 19 appears to create a new right of appeal from the grant or refusal to grant a writ of prohibition, mandamus, *habeas corpus*, or *quo warranto*, &c. They refer to *Dule's Case*, in which the appeal of a remanded prisoner was heard, and add the remark, which is inapplicable to our legislation, that the Act would seem also to give an appeal to a party at whose suit an imprisonment is procured; and they say, taking the same view that I have taken of the effect of the consolidation of the Courts: "At the same time the 3rd and 16th sections of the Act, by constituting a single Court out of many, seem to extinguish the right which a remanded prisoner had before the Act of applying to one Court after another."

It thus appears that, whether tested by the effect of the statute of 1866 alone, or by the effect of the Judicature Act, the claim of the prisoner to the writ which has been quashed cannot be maintained; but he has the combined effect of both statutes against him.

I am, therefore, of opinion that we should dismiss the appeal.

HAGARTY, C. J.—I am of opinion that this Court cannot entertain this appeal.

The appellant has already brought his case before this Court on appeal from the decision of the Chancery Division. He failed to obtain a reversal of that decision, and the result was that it remains in force, and the appeal was and is dismissed.

He now comes before the same Court on precisely the same question, and desires to have it reheard or reargued.

It is for all purposes the same Court sitting to-day. The accident of one Judge occupying the place of another Judge cannot make any legal difference.

Giving the applicant the benefit of assuming for the argument that he had the right to apply for his discharge on *habeas corpus* to each of the Divisional Courts, or even to each individual Judge, it appears to me that having appealed from any one of them to this Court as his last Court of resort here, he must finally abide the legal result of such appeal, viz., the dismissal of it and consequent affirmance of the decision appealed from. He has had his appeal to this Court. He has failed; and I cannot see any right that he has to ask their interference on the same state of facts precisely.

I cannot believe the law to be in such a state as to tolerate renewed applications to this Court on the speculation of a change in its composition.

I think the Common Pleas Division rightly considered the matter as concluded between the parties. I wish to confine myself strictly to the decision of the precise question before us, viz., can this appeal be entertained? I hold that it cannot: that the applicant in this matter of extradition is finally concluded by the result of his previous application; and I do not find it necessary to discuss the bearing of such a result in any future proceeding in which other parties may be interested.

I have examined the authorities. I do not deem it necessary to review them.

SPRAGGE, C. J. O., concurred.

BURTON, J. A.—I agree with my brother Patterson, that having in view the provisions of our Act of 1866, the Divisional Court were right in their conclusion that the writ of *habeas corpus* was improvidently issued, and that this appeal should therefore be dismissed. I think it not improbable that the framer of that enactment intended to substitute the right of appeal for the less satisfactory proceeding of successive applications from Judge to Judge or Court to Court, but without speculating on the effect of the enactment in that respect, it is sufficient to say that

having resorted to appeal, the effect of the dismissal of the appeal and the consequent affirmance of the judgment of the Chancery Division must, as regards the applicant and the subject matter of the decision, be as final and conclusive as if the judgment had in fact been affirmed by this Court *nemine dissente*. But I also desire to guard myself against appearing to assent to the reasoning of the Judges of the Common Pleas Division in arriving at that conclusion, and countenancing the doctrine that a judgment so affirmed is binding as an authority otherwise than in the actual case in which the decision is made. I think the grounds for the technical rule adopted by the House of Lords have no existence in other appellate tribunals even when that tribunal, as in the present instance, happens to be the Court of last resort in the particular case.

In that House the speaker has no casting vote, and when there is an equality of votes on any question the effect is the same as if there were a majority of not contents, the maxim of the House being *semper præsumitur pro negante*.

Applying the same rule to the House sitting in its judicial capacity, if on a motion to affirm a judgment the Lords should happen to be equally divided, the motion would be negatived, and the reversal the consequence, for the House having once resolved that the judgment complained of was not to be affirmed, could not afterwards contradict that determination. Mr. McQueen, in his work on the Practice of the House of Lords, points out that being bound to adjudicate upon the question at issue it was driven by its previous vote to reverse, and to prevent this consequence it was at an early day made a standing order that upon giving judgments on appeal the question should be put for reversing and not for affirming, and by this means the decisions of inferior Courts on an equal division of opinion among the Lords are invariably affirmed. If, upon the question being put, the not contents have it the effect of that vote would be merely to declare that the decision was not to be reversed, which would be in fact no judgment at all, but a mere negation; but as the

House must arrive at some positive adjudication upon the case brought before it, another question is put, "whether it is their Lordships' pleasure that this judgment be affirmed," and as the fate of this question is held to be substantially decided by the preceding determination, the judgment of affirmance is pronounced as of course.

It will be seen that from the necessity of the case, inasmuch as the Court of last resort when applied to for the purpose of settling and establishing the law has to come to some decision, and that decision has the force of law for all time until altered by an Act of Parliament, the rule in question has been adopted by the House of Lords; but no such necessity exists in the case of any other appellate tribunal; a decision arrived at by this Court in this case would not require an Act of Parliament to deprive it of its effect as an authority, but would be liable to be reversed at any time by a superior tribunal.

The result, therefore, of a division of opinion in any other appellate Court, as well as of Courts of first instance, is simply that the rule or motion drops or the appeal is dismissed. I think one of the earliest matters impressed on my mind when I commenced the study of the law, and what I believe now to be the generally received opinion in the profession, was that in such cases the appeal fails, and that the judgment below remains undisturbed, but is not considered as a binding authority.

I had taken some pains to ascertain what authorities there were on the subject, and had prepared a judgment referring to them, but they are all collected and so ably reviewed by my brother Patterson that I do not think it necessary to make further reference to them.

It is not without significance, however, that it was Lord Campbell, who has always so stoutly contended for the absolute finality and binding authority of a decision of the House of Lords, even upon the House itself, who decided the motion for costs in *Dansey v. Richardson*, 3 E. & B. 722, where it was urged that the successful party was entitled to costs, and he uses this language: "That is true, and in

the House of Lords where the Lords are equally divided the respondent is successful, for a decision in his favour is made on the principle *semper præsumitur pro negante*. But when this Court is equally divided on a rule there is no decision and no successful party."

It will be noticed that the learned Judge refers only to the practice of the House of Lords, and does not recognize it as existing in any other appellate Court.

Mr. Chitty in his general practice of the law speaks of the question in this way: "If the Court should be equally divided, then there can be no rule, order, or judgment, but in such cases where considerable property is at stake, or it is otherwise important to have a decision of a Court of Error, and it is desired to take the cause into the Exchequer Chamber or the House of Lords, it is usual for one of the Judges to withdraw his opinion so as to enable the two Judges then constituting the majority to declare their formal judgments, by which means there may be an appeal to the highest tribunal."

No distinction is drawn between the Courts of first instance and the intermediate appellate Courts.

Although the practice in American Courts is of little value in deciding a point of this nature, I see nothing in the case of *Durant v. Essex Company*, 7 Wallace 107, which at all conflicts with this view. The decree in that case was in force whether the Court of Appeal in terms affirmed it or dismissed the appeal, and it appears that the practice of the Court in such cases was to order that the decree of the Court below be affirmed with costs; in fact they appear to have adopted the practice of the House of Lords.

But the language of the Court in that case tends, I think, to confirm the view which I have taken. "It has long been the doctrine," says Mr. Justice Field, "in this country and in England, where Courts consist of several members, that no affirmative action can be had in a cause where the Judges are equally divided in opinion as to the judgment to be rendered or order to be made. If the affirmative

action sought is to set aside or modify an existing judgment or order the division operates as a denial of the application, and the judgment or order stands in full force to be carried into effect by the ordinary means."

The learned Judge not unnaturally has a rather hazy notion about the practice in the English Courts, which tends to shew how unsafe it would be for us to follow American decisions in matters of this kind depending upon the practice adopted by the Courts themselves. It appears that it was the established practice in that Court to affirm the judgment, but the learned Judge remarks that the legal effect would be the same if the appeals were dismissed, and he concludes with this passage: "The statement which always accompanies a judgment in such case, that it is rendered by a divided Court, is only intended to shew that there was a division. It serves to explain the absence of any opinion in the cause, and *prevents the decision from becoming an authority for other cases of like character.*"

That being the effect, I venture to think it is effected in a much simpler manner by the course adopted here and in England of dismissing the appeal, and allowing the judgment to remain undisturbed.

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## HALE V. KENNEDY.

*Practice—Appeal on questions of fact.*

The rule generally followed by the Courts is not to review the finding of the Judge of first instance, where his decision depends upon a balance of testimony; still if the Court in *banc* upon an application to it has reversed that finding, this Court must be satisfied upon appeal, that the Court in *banc* was wrong before it will interfere with that judgment.

THIS was an appeal by the defendant from a rule of the Court of Common Pleas, directing a verdict which had been entered by Burton, J. A., for the defendant, to be set aside and a verdict entered for the plaintiff for \$470.60; leave having been reserved by the learned Judge at the trial to move therefor, and came on to be heard on the 3rd of February, 1882.\*

The question involved in the suit was one of fact exclusively, as appears in the judgment; and it is not necessary to state it here more fully.

*C. Robinson, Q.C., and Burritt, for the appellants.*

*Bethune, Q.C., and Deacon, Q.C., for the respondents.*

March 24, 1883. PATTERSON, J. A.—Hale and Rowan, who were partners in lumbering, were getting out saw logs in the region of the Kippewa Lake, which is on the north of the River Ottawa, and is connected with that river by the Kippewa River, and also by a stream called Gordon Creek. By taking the logs down Gordon Creek into the Ottawa, instead of by way of the Kippewa River, a distance of from sixty to ninety miles in the drive to the city of Ottawa is saved. To make Gordon Creek navigable, however, expensive improvements were required, and lumberers using them were charged tolls.

The plaintiffs were driving logs through the creek, when Robert Porteous, acting as agent for the defendant

\**Present.*—SPRAGGE, C.J.O., PATTERSON and MORRISON, JJ.A., and ARNOCK, J.



demanding payment of tolls on behalf of the defendant under circumstances which, as there is sufficient evidence to shew, left but little choice to the plaintiffs between complying with the demand and having their logs stopped.

The plaintiffs agreed to pay the demand upon an undertaking given by Porteous on behalf of the defendant, to repay the amount in a certain event. What that event was is the dispute. A written memorandum or letter was talked of when the bargain was made, but it was not given. Consequently the parties have their own negligence to blame for the litigation for which they left the door open; and neither of them can reasonably complain if the version which his memory now supplies is not accepted. Memory is proverbially unreliable; but when to this consideration we add the possibility that in talking the matter over, in the heat of the contest which arose out of the threats and the demand of Porteous and the protest of the plaintiffs that they had already become liable to Booth for the same tolls, the precise terms of the condition on which the money was to be repayable may not have been understood in the same way by each party, and may not have been so carefully expressed as if they had written them down, we can easily believe that each may now honestly state the matter as he thinks it was, and yet each state it differently.

The plaintiffs' version is, that the defendant was to repay them whatever they had to pay Booth, which would of course, as so expressed, create the liability whether the payment to Booth was by reason of the plaintiffs' previous promise to pay him, or because Booth may have been, irrespective of any such promise, in a position to compel payment. Porteous on the other hand, asserts that he only promised that Kennedy should refund in case Booth had authority from Kennedy to collect tolls.

The learned Judge at the trial took the defendants' view, founding his opinion chiefly upon what struck him as the improbability that Porteous should have agreed that the

money should be repaid upon what seemed to be a certain and not a contingent event ; because, as the plaintiffs told Porteous they had bound themselves to Booth, it was certain, in the learned Judge's view of the evidence, that they would have to pay Booth.

In the Court of Common Pleas, the other view prevailed, and was founded upon a careful examination of the facts and evidence, and upon the reasoning of which the learned Chief Justice has given us the advantage in the exhaustive judgment which he delivered.

I have for my own part, given the whole of the evidence a very full consideration, with the result of making it clear to my mind, that while we cannot deny the force of the considerations which influenced the judgment of the learned Judge who tried the action, it is impossible to say that the judgment of the Court of Common Pleas was not fully supported by the aspect in which the facts were treated or that the facts were not with perfect fairness to the parties, and without any straining in the direction of the conclusion arrived at, properly so treated.

Under these circumstances, and especially as the defendant or his agent accepted the risk of such construction as the Courts might put upon the evidence, when he stopped short of putting the bargain in writing, it would in my opinion be wrong for us to entertain the idea of interfering with the judgment appealed from. We certainly could not say that that judgment was wrong.

I do not attempt to detail the facts or evidence, because they are so fully set out or alluded to by the learned Chief Justice in the Court below, that I should be able to do little beyond repeating what he said.

I am not usually in favour of applying rules or formulæ to the discussion of questions of fact. They are apt to create a temptation to substitute them for the independent judgment of the Court to which suitors are entitled. But the principle upon which an appeal should be dealt with stands on different ground ; and that which should govern a case like the present is well expressed by Lord O'Hagan

in a passage which has been more than once quoted in this Court.

In *Symington v. Symington*, L. R. 2 Sc. App. at p. 424, the noble Lord is reported to have said: "On the first question we have been fairly pressed by the argument that the Lord Ordinary, who had the advantage of seeing the witnesses and judging of their veracity from their demeanour before himself, should not have his decision lightly set aside. And undoubtedly the value of *viva voce* testimony can be much better ascertained by those who hear it than by those who know it only from report. But there is this peculiarity in the present case, that the Lord Ordinary has put us somewhat in his own position, and enabled us, so to speak, to see with his own eyes, when he states the impression produced on him by the principal witness. \* \* Besides, we are concerned directly, not with the judgment of the Lord Ordinary, but with that which overruled it; and the latter we ought to affirm, unless we are convinced of its error."

I think we should dismiss the appeal, with costs.

SPRAGGE, C. J. O., and MORRISON, J. A., concurred.

ARMOUR, J., was absent and took no part in the judgment

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## STAMMERS V. O'DONOHUE.

*Vendor and Purchaser—Specific performance—Contract—Misdescription of state of property—Compensation for defects.*

The decree of the Court of Chancery (28 Gr. 207), affirmed on appeal with costs.

In letters written by the solicitor of a purchaser of land sold at auction it was stated that the advertisement of sale had represented that twenty acres of the land purchased from the defendant had been cleared and fenced, whilst the fact was no fencing whatever remained on the premises, and by reason thereof claimed compensation, and in his answers thereto the defendant did not deny the fact of sale and purchase, but disputed the right to compensation :

*Held*, a sufficient admission of the fact stated to take the case out of the Statute of Frauds, although no contract of sale had been signed by the vendor.

THIS was an appeal by the defendant from a decree of the Court of Chancery, (28 Gr. 207), ordering specific performance of the contract for sale alleged to have been entered into between the parties under the circumstances stated in the report.

From the exhibits proved in the cause it appeared that a sale by auction had been advertised by Messrs. Coate & Co., Auctioneers, of certain properties as follows :

"The Mart—Peremptory auction sale of city property. 'The Rennie Property,' freehold, west-end, will be sold on Saturday, 15th May, at one o'clock p.m., at the Mart.

Also, in the county of York, within four and a half miles of the town of Newmarket, a farm 81½ acres, twenty acres cleared and fenced.

Terms liberal and made known at time of sale."

The sale papers shewing the conditions were, so far as material, substantially the same.

The fifth condition of each being.

"The auctioneer signing these sale sheets shall bind both vendor and purchaser."

The sale paper of the lot in question was as follows :

"May 15th."

"Sale of lots numbers one, two, and three within and annexed hereto described."

"Parcel or Lot No. 2."

"The Brecken Farm consisting of 81½ acres, in the township of East Gwillimbury, in the county of York, about four and a half miles from Newmarket, and may be better known and described by description thereof contained in and now read from deed thereof, from the Rev.

Abraham James Broughall, to Joseph Brecken, which deed is dated 25th day of January, 1854 and registered in the Registry office of the North Riding of York, numbered 117 for the township of East Gwillimbury, containing 88 acres less 6½ sold thereof."

"Toronto, 15th May, 1880."

I hereby agree to purchase the above 81½ acres on the conditions and terms within mentioned, for the sum of five dollars (\$5.00), per acre.

S. J. STAMMERS."

Witness,

JNO. D. OLIVER.

The appeal came on to be argued on the 12th of September, 1882.\*

The appellant in person.

*Bain*, for the respondent.

The cases referred to appear in the report in the Court below and in the judgment.

February 6th, 1883. SPRAGGE, C. J. O.—The plaintiff's case is, that he was the purchaser at a sale by auction on the 15th of May, 1880, of a parcel of land in the township of East Gwillimbury, containing 81½ acres; and that the defendant was the owner and vendor. The defence is, that there was no memorandum or note in writing of the alleged sale within the Statute of Frauds.

There is no question upon the fact of there having been a sale by auction at the time named, of the land in question; and that an agreement to purchase the same was signed by the plaintiff, and that that agreement was at the foot of the conditions of sale.

I gather from the objections made by the defendant's counsel at the hearing, during the examination of Oliver, the auctioneer, that the great point made by the plaintiff, and resisted by the defendant, was to connect the advertisement for sale with the conditions and agreement; the advertisement describing twenty acres of the land as cleared and fenced; while the heading to the conditions, the conditions themselves, the description at the foot of the conditions, and the agreement make no mention of any

\*Present, SPRAGGE, C.J.O., BURTON, PATTERSON, J.J.A., and CAMERON, J.

clearing or fencing; and it appears by the subsequent correspondence between the parties that that was the real contest between them.

The reasons of appeal, however, shortly take the ground that "there is no sufficient agreement or memorandum in writing of the said contract to constitute a binding agreement within the Statute of Frauds."

The fifth condition of sale runs thus: "The auctioneer signing these sale sheets shall bind both vendor and purchaser to these conditions and terms." The purchaser signed with his own hand. The name of the auctioneer, signed by himself, is also appended to the agreement of sale; but the contention is, that he signed as a witness, and not in pursuance of the fifth condition, or otherwise in his capacity of auctioneer.

It is clear that an auctioneer has authority, without its being made a special condition of sale, to sign for both vendor and purchaser: *Emerson v. Heelis*, 2 Taunt. 38, and the observations of Lord Langdale, in the *Earl of Glengall v. Barnard*, 1 Keene at p. 787; also the 4th ed. of Mr. Justice Fry's book on Specific Performance, sec. 511.

Mr. O'Donohoe founds his objection to the signature of the auctioneer on the position of his name at the foot of the contract. The word witness is, I suppose, printed at the foot of the contract in the same position in which it appears in the appeal book; and the name of the auctioneer was, I assume, signed in the same position. Put where it is, the signature might be either as auctioneer or as a witness. It is not so placed that it may not be either one or the other; and having regard to the fifth condition, and there being no other signature for the vendor, the intendment would be that the signature of the auctioneer was as auctioneer, in pursuance of the condition in that behalf, and for the vendor.

The difficulty remains that, so far, it does not appear by any writing who is the vendor. There are two decisions by the Master of the Rolls reported in 18 Eq. One, *Sale v. Lambert*, (p. 1) decides that a statement in the particulars

and conditions that the sale is by direction of the proprietor is sufficient. In the other case, *Potter v. Duffield*, (p. 4) which was also a sale by auction the particulars and conditions did not disclose the vendor's name, or describe him as proprietor or otherwise; and Sir George Jessel held that there was no contract within the statute.

We are referred to the correspondence which passed between the parties after the sale, which shews, as the plaintiff contends, that the defendant was the vendor. It appears by the correspondence that the defendant himself insisted that there had been a sale; and insisted also that it should be carried out, and required the payment of a sum of money by way of a premium to forego it. The difficulty was in respect of the twenty acres to which I have already referred.

It is clear from the correspondence that there was a sale of some land, clear also that the plaintiff was the purchaser; and I think sufficiently clear also that the defendant was the vendor. All the letters, except one, written on behalf of the vendor, are signed "O'Donohoe & Haverson," (the name of the legal firm in which the defendant was a partner,) the exception is a letter dated 29th June 1880, which is signed in the name of the defendant *himself*. The signatures to all are by the defendant. A letter from the plaintiff's solicitor, Mr. Meyers, dated 18th June, 1880, is headed "Re sale O'Donohoe and Stammers," and the receipt of that letter is acknowledged without question as to the subject matter being properly headed. A letter from the same solicitor of the 21st of the same month, has this passage, "I have to say that I am prepared to close the purchase by Mr. Stammers from Mr. O'Donohoe at once," and the answer thereto of the same date is, "Herewith please receive deed for approval." Mr. Meyers, in his letter of the 21st, had claimed compensation in respect of the twenty acres, which he says were represented at the sale to be cleared and fenced, "as set out in the advertisement." The defendant in his letter of the 29th repudiates this claim, and adds: "On your refusal.

any longer to complete the purchase, I shall take immediate steps to enforce the *contract*." The language is that of a person who was himself the vendor, in the "purchase" and the "contract", in relation to which he writes. In a previous letter, dated 14th June, Mr. Meyers had made the same claim, and in it, as in his letter of the 21st, refers to the advertisement of sale as representing twenty acres to be cleared and fenced.

The defendant himself in his letter of 29th June, written in answer to Mr. Meyers's letter of the 21st says: "I am unable to find any authority for such compensation as you speak of. I think if you look at the subject in *Sugden's V. & P.*, you will abandon any claim of the kind." When the defendant wrote this he had received two letters, in each of which it was asserted that, in an advertisement for the sale of the land which the writer's client had purchased—the second letter says purchased from the defendant—it was stated that twenty acres thereof were cleared and fenced, and in his answer to the last the defendant does not deny the fact, but questions the law. Upon such an answer being properly taken as an admission of the fact stated, I may refer to *Jackson v. Lowe*, 1 Bing. 9.

The correspondence then, taken by itself, shews that there was a contract between the defendant and the plaintiff for the sale of some land by the former to the latter; and looking at the correspondence in relation to the claim for compensation in respect to the condition of twenty acres of the land sold, I take it that it shews also that the land which was the subject of that contract was land in regard to which an advertisement had been issued in which it was stated that twenty acres thereof had been cleared and fenced.

Lord Cranworth had held in *Ridgway v. Wharton*, when that case was before him in the Court of Chancery, 3 D. M. & G. 677, that in order to make a contract binding under the Statute of Frauds it must be either embodied all in one paper, signed by the party, or if not so embodied there must be some paper signed by the party referring to



the paper which does contain the terms, in order that from the writing so signed you may say that is the paper ; and incorporate them together and make them one—in other words that the identity of the paper referred to cannot be proved by parol, and this position is contended for by the defendant in this case. But when *Ridgway v. Wharton*, came before the House of Lords, 6 H. L. C. 256, upon appeal, Lord Cranworth retracted the opinion that he had given in the Court below, and after referring to the case of *Dobell v. Hutchinson*, 3 A. & E. 355, he held that if authority was given by the defendant in the case to Crawter, his agent, to agree to grant a lease ; and if Crawter in the exercise of that authority entered into an agreement to grant a lease in the terms of the instructions which he gave to Gregson ; parol evidence shewing what those instructions were, and that they were written instructions, would be sufficient to take the case out of the Statute of Frauds. The other learned Lords agreed with Lord Cranworth as to the admissibility of parol evidence for the purpose indicated, and it is now settled law that parol evidence is admissible for that purpose.

The point is so clearly put by Mr. Justice Fry, in his book, 2nd ed., sec. 325, that I cannot do better than quote his language : “ Every valid contract must contain a description of the subject matter, but it is not necessary that it should be so described as to admit of no doubt what it is ; for the identity of the actual thing, and the thing described may be shewn by extrinsic evidence.”

See also secs. 520, 521.

The case of *Ogilvie v. Foljambe*, 3 Mer. 52, decided by a very eminent Judge, Sir Wm. Grant, is a case which well illustrates the point in question. The first question in the case, as put by the learned Judge, was whether there was a complete agreement between the parties, and as to that he says : “ The agreement, supposing it to be properly signed, is reduced to sufficient certainty by the two letters of the 26th of June, 1814. I see nothing that remained to be adjusted between the parties—nothing that required

explanation ; nothing that remained to be the subject of further treaty or correspondence. The subject matter of the agreement is left indeed to be ascertained by extrinsic evidence ; and for that purpose such evidence may be received. The defendant speaks of *Mr. Ogilvie's house*, and agrees to give £14,000 for *the premises*, and parol evidence has always been admitted in such a case to shew to what house and to what premises the treaty related." The application of the language of this judgment to the case before us is obvious.

*Owen v. Thomas*, 3 M. & K 353, is referred to with several other cases by my brother Patterson in *Bland v. Eaton*, in which he delivered the judgment of this Court 6 App. at p. 83, and is thus summarized by him : " A person having sold a house at Chepstow wrote to his solicitor, ' I have sold my house to Mr. Thomas for so much money. The deeds are in your hands.' This was held by Sir John Leach to be sufficient, as it could be ascertained by inquiry before the Master what property the deeds referred to." Counsel omitted to refer to this case in the argument upon this appeal.

A reason given by Lord Justice Mellish for his judgment in *Catling, v. King*, 5 Ch. D. 660 is also apposite to this case : " It appears to me that if a man is described as a trustee for sale of certain property he must be so by virtue of some written instrument, and the production of the document making him a trustee for sale of the property in question identifies him." There must of course be parol evidence to authenticate the instrument of trust. So here a contract is referred to by that term, and a contract for the sale of land. It must be assumed to be in writing, and the tenor of the letters indicates that it is so, and only one such contract is spoken of in the correspondence. A contract of the character referred to in the letters is produced and verified ; and that contract shews what particular land is the subject of the contract, and the price and terms of payment. The letters and the document which is the contract

spoken of in the letters form together, in my opinion, a complete contract within the Statute of Frauds.

If any thing were wanting, which I think there is not, to complete the identification of the contract, outside the letters, with the contract referred to in the letters, and to evidence more completely what land was the subject of sale, it is supplied by the reference contained in two of the letters to the advertisement of sale. That advertisement is verified by parol evidence as the advertisement under which the sale took place, and this fact is thereby established—that a portion of the land, which the letters shew was the subject of the contract, viz., twenty acres of it, was described in the advertisement of sale as cleared and fenced; and the advertisement produced and connected by parol evidence with the contract of sale, does so describe twenty acres of the land offered for sale.

Further, the conditions of sale themselves shew that there was another paper relating to the sale besides that at the foot of which the contract of sale was signed. The fifth condition speaks of “the auctioneer signing these sale sheets.” The advertisement would properly answer that description; and it does not appear that there was any other paper that would; and it would in that case form part of the contract by the reference in the letters, and by the parol evidence to which I have referred, whether signed by the auctioneer in pursuance of the fifth condition or not. I have examined all the cases to which we were referred and some others.

Upon the whole I think that a contract of sale, within the Statute of Frauds, is clearly made out, and that the appeal should be dismissed, with costs.

BURTON, PATTERSON, J.J.A., and CAMERON, J. concurred.

RE BOARD OF EDUCATION OF THE VILLAGE OF MORRISBURGH AND THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF WINCHESTER.

*High School Board—Requisition for money for school purposes.*

On the 29th April, 1878, the Board of Education of the incorporated village of Morrisburgh, which was formed by the union of the High School Board of High School District No. 4 of the united counties of Stormont, Dundas, and Glengarry, and the Public School Board of the incorporated village of Morrisburgh, in which village the high school was situated, resolved that the sum of \$7,000 should be levied on High School District No. 4, to cover the expense of building, furnishing, &c., for purposes of the high school.

*Held*, that the joint board, and not the High School Board, was the proper body to make the requisition for the money, under 37 Vict. ch. 27, sec. 63; adopting the construction put upon that section in *Re Perth*, 39 U. C. R. 34, which had been confirmed by implication by 42 Vict. ch. 34. The county council of the united counties, acting under 37 Vict. ch. 27, sec. 38, which gave power to every county council from time to time to determine the limits of a high school district for each high school existing in the county and within its municipal jurisdiction, had, on 23rd June, 1876, by by-law No. 516 declared that District No. 4 should consist of the village of Morrisburgh and the townships of Williamsburgh and Winchester. Section 38 was repealed by 40 Vict. ch. 16, sec. 18, which, however, declared that all high school districts which existed at the time of its passing (viz., 2nd March, 1877), should continue until the county council should think fit to discontinue them. On 12th October, 1877, the county council passed by-law No. 551 in which, after reciting, *inter alia*, that it was expedient to consolidate all acts and by-laws of those counties which in any way related to high school districts, proceeded in direct terms to repeal several by-laws including No. 516, and then went on to enact that the united counties should be divided into five districts for high school purposes, No. 4 and No. 5 being in the county of Dundas, and No. 4 embracing Williamsburgh, Winchester, and Morrisburgh.

*Held*, that although the reconstruction of the districts was *ultra vires* and void, because the power to determine the districts had ceased at the passing of 40 Vict. ch. 16; yet the repeal of by-law 516, being within the power to discontinue the districts which that statute preserved, was valid, and the township of Winchester had therefore ceased to be part of district No. 4 before the resolution of April, 1878, was passed.

The board of education, acting under the resolution of April, 1878, had on 19th July, 1878, made a demand upon the township of Winchester for its proportion of the money required. Before that demand was made another by-law, No. 590, had been passed on 22nd June, 1878, by the county council, repealing that portion of by-law No. 551, which related to high school districts for high school purposes in the county of Dundas, and enacting, *inter alia*, that district No. 4 should embrace the village of Morrisburgh only. This by-law was passed after a majority of the reeves and deputy reeves of the county of Dundas had, under the power given by 41 Vict. ch. 15, requested the county council to abolish the districts Nos. 4 and 5, and to constitute the corporation of the village of Morrisburgh High School District No. 4.

*Held*, that this by-law was effectual to abolish district No. 4, if that district had continued to exist after the passage of by-law No. 551.

When the demand was made in July, 1878, by-law 590 was in force. It was moved against in the Court of Queen's Bench in November, 1878, and was quashed so far as it assumed to determine the limits of districts, but not so far as it repealed by-law No. 551 : *Chamberlain v. Stormont*, 45 U. C. R. 26.

On 27th June, 1879 the county council passed another by-law No. 617, simply abolishing the existing high school districts in the county of Dundas. At this time no part of the money demanded had been levied. This by-law was passed after the rule *nisi* for a mandamus in the matter had been granted, but before it was argued.

*Held*, agreeing with GALT, J., who had discharged the rule *nisi* for a mandamus, and with HAGARTY, C. J., who dissented from the judgment of the majority of the Court of Queen's Bench (45 U. C. R. 460), that if the demand had been originally valid, it could not be enforced after the passage of by-law No. 617, and nothing would have remained in question but the costs of the application.

THE facts of this case are fully set forth in the report thereof in the Court below. (45 U. C. R. 460.) The defendants appealed on the grounds, amongst others : (1) That there was no legal liability on the part of either of the appellants to raise the sums mentioned in the rules in these matters, or any of them. (2) That no sufficient demand was made by the applicants upon the appellants, or either of them, to compel the raising of those sums. (3) That even if the demands which were served were sufficient at the time when they were served under the by-law then in force, the appellants were justified in refusing to raise the sums demanded, and no demand had been made since the quashing of the by-law in *Re Chamberlain v. Stormont, Dundas, and Glengarry*, 45 U. C. R. 26 ; and (4) That no demand was made by anybody having the legal right to make it. (5) That the townships of Williamsburgh and Winchester, which had originally formed part of high school district No. 4, had ceased to be part thereof before any liability to pay the amount arose on the part of those townships, or either of them. (6) That even if the legislation of the county council of the united counties of Stormont, Dundas, and Glengarry had been ineffectual to abolish high school district No. 4 prior to the 29th June, 1879, on that day the said county council passed a by-law in the words of the statute in that behalf, discontinuing the high school districts in the county of Dundas, and thereupon any liability on the part of the appellants

was at an end. (7) That this being a sum of money which ought to have been raised, if at all, in the year 1878, it ought not to be imposed upon the ratepayers of the year 1881; and (10) even if the Court had a discretion to grant the relief, it ought not to have been exercised in favor of the applicants.

The appeal came on to be argued before this Court on the 24th and 25th of January, 1882. \*

*Bethune*, Q.C., for the appellants.

*McCarthy*, Q.C., for the respondents.

The authorities cited appear in the judgment.

February 23, 1883. PATTERSON, J.A.—On the 23th April 1878, the Board of Education of the incorporated village, of Morrisburgh resolved “that the sum of \$7,000 be levied on High School District No. 4, to cover all expenses, building furniture, fence, and outbuildings for purpose of high school.”

On 27th May, 1878, the board by resolution appointed the chairman of the board, as its legal representative, to make a legal requisition on the municipalities then constituting High School District No. 4, asking that they provide their ratable proportion of the sum of \$7,000 for the erection of a high school in said High School District No. 4.

The chairman accordingly prepared a demand in writing under his hand and the seal of the Board of Education, requiring the corporation of the township of Winchester to raise from that municipality \$2,676.75, as the proportion payable by that township, and caused it to be delivered, on 19th July, 1878, to the Reeve of Winchester

At the same time he served a similar demand for \$152.94, the proportion of \$400 required as a supplementary grant towards the maintenance of the high school, for doing which he had also the authority of the board.

\**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A

The township authorities have not paid any part of either of the sums demanded, and the board has applied for a mandamus to compel the payment. The writ was granted by the Court of Queen's Bench on 31st December, 1880, the Chief Justice dissenting (45 U. C. R. 460), and the township has appealed to this Court.

The main question for decision is the liability of the township, under circumstances which I propose to examine, to contribute to the construction of the building or the maintenance of the school; but there is a preliminary objection to the right or power of the Board of Education to act in the matter. It is contended that if the liability exists it is at the instance of the High School Board only, and not of the board which is formed by the union of the High School and Public School Boards.

High School District No. 4 comprised on 19th July, 1878, as asserted by the board, the village of Morrisburgh and the townships of Williamsburgh and Winchester, all in the county of Dundas.

The Board of Education is a union board, composed, as we are told by the treasurer in his affidavit, of the High School Board of High School District No. 4, and the Public School Board of the incorporated village of Morrisburgh; but no one tells us when or under what circumstances the union took place.

We may infer that it was effected before 24th March, 1874, because the statute passed on that day prohibited the formation of new unions after 1st July, 1874, and we have no reason to suppose it was formed between those dates.

The Statute 37. Vict., ch. 27, which was passed on 24th March, 1874, contained in section 63 the provision that in all cases of the union of high school and public school trustee corporations then existing, all the members of both corporations should constitute a joint board, and should, as long as the union existed, be a corporation under the name of the Board of Education for the city &c., &c.; and that seven members should form a quorum; and that such board should have the powers of the trustees of both the public and high schools.

This language was expanded a little by 42 Vict., ch. 34, passed 11th March, 1879, which substituted the following: "Seven members of such board shall form a quorum ; and such board shall have, possess, discharge, and exercise, in respect of public school matters, all the rights, powers, and duties of public school boards, and in respect of high school matters all the rights, powers, and duties of high school boards."

This amendment defined and limited the powers of the boards of education, by making it plain that the powers peculiar to public school trustees were not, by the effect of the union, applied to the management of the affairs of high schools, and *e converso* ; while it at the same time confirmed by implication the construction which the Court of Queen's Bench had, in 1876, put upon the former Act, when it decided, in *Re Perth*, 39 U. C. R. 34, that the joint board, and not the High School Board, was the proper body to make requisition for money to erect a building for the high school.

I do not gather from the report of *Re Perth* whether or not that high school district extended beyond the limits of the territory under the jurisdiction of the public school trustees. In this case we have the public school trustees, who are elected by the ratepayers of Morrisburgh, taking part—and for anything we know, the controlling part—in imposing a heavy taxation upon the ratepayers of Winchester. There seems something anomalous in this, and opposed to principles now generally acted upon. It is, however, the direct effect of the statute ; and it differs in degree only from what would be the state of things if the boards were not united, for the township has no voice in the appointment of the high school trustees otherwise than as being represented in the county council by which three of the six are appointed, the other three being appointed by the corporation of Morrisburgh, in which village the high school is situated. (37 Vict. ch. 27, sec. 52, which agrees with the act of 1865, 29 Vict. ch. 23, sec. 2.)

The preliminary objection therefore fails, and I proceed to



consider the connection of the township of Winchester with High School District No. 4.

At the date of the demand on 19th July, 1878, the liability of school districts was provided for by R. S. O. ch. 205, sec. 30, which enacted that in cases where two or more municipalities, or portions thereof, within the county, had theretofore been formed into and constituted one high school district, or in cases where two or more such minor municipalities, or portions thereof, should thereafter agree to form and constitute themselves into a high school district, then such sums as should be required, other than the amounts paid by the government and by the county council, for the maintenance and school accommodation of the high school should be provided by the high school district, upon the application of the High School Board. Such sums were to be raised in the manner provided in the next following section of the act: but it was declared that nothing in sec. 30 was to be construed to affect any existing suit, or to prevent the county council from discontinuing any high school district theretofore formed by it. I call attention to this last provision, as I shall have to refer to it again. The provisions of sec. 31, so far as they need be now noted, were that the councils of the respective municipalities liable therefor should, upon the application of the High School Board, raise the proportion required to be paid by such municipality, or part of the municipality, from the whole or part of the municipality, as the case might be.

A new section was substituted in 1879 for sec. 30, by 42 Vict. ch. 34, but the provisions I have just quoted were not varied.

It is now necessary to glance at the history, which was somewhat chequered, of District No. 4, as shewn by the by-laws of the county council which have been put in evidence.

By-law 396, passed 23rd June, 1871, assigned to the district Morrisburgh, Williamsburgh, and Winchester.

No. 429, on 21st June, 1872, cut off the half of Winchester, which became district No. 6.

On 31st January, 1873, the other half of Winchester was, by by-law 444, formed into district No. 7.

But on 23rd June, 1876, districts 6 and 7 were abolished by by-law 516, and Winchester was restored to No. 4.

All these four by-laws were passed in pursuance of the statutory powers of the county council. At the date of the last of them, the power was contained in the 38th section of 37 Vict. ch. 27, which re-enacted former laws declaring that every county council should from time to time determine the limits of a high school district for each high school existing in the county and within its municipal jurisdiction.

That power was taken away in 1877 by 40 Vict. ch. 16, the eighteenth section of which repealed sec. 38, but declared that all high school districts which existed at the time of the passing of that Act, (viz. on 2nd March, 1877), and arrangements connected therewith, should continue until the county council should think fit to discontinue them.

Then began the proceedings which have been the subject of this litigation.

Another by-law, No. 551, was passed on 12th October, 1877. It deserves to be considered at some length.

“A by-law of the corporation of the united counties of Stormont, Dundas, and Glengarry for determining the limits of high school districts within the united counties.

[ “ *Passed 12th October, 1877.* ]

“Whereas, under the high school law, it is the duty of the county councils to determine the limits of high school districts within their jurisdiction ;

“And, whereas the municipal council of these united counties has from time to time passed by-laws determining the same.

“And, whereas it is expedient to consolidate all Acts and by-laws of these counties which in any way relate to high school districts ;

“Therefore, the municipal council of the corporation of the united counties of Stormont, Dundas, and Glengarry, enacts as follows :—

“1. That from and after the passing of this by-law the following by-laws of the municipal council of the corpor-

ation of the united counties of Stormont, Dundas, and Glengarry shall be, and the same are hereby repealed: that is to say by-laws numbers three hundred and ninety-six, four hundred and twenty-nine, four hundred and forty-four, four hundred and ninety-four, five hundred and seven, five hundred and sixteen, and all other by-laws and parts of by-laws relating to high school districts."

If the by-law had stopped here there could have been no serious objection to its validity, so far as I can perceive. The Act of 1877, while it had deprived the county council of further power to construct high school districts had left its destructive power untouched. It expressly affirmed the power to discontinue the districts, and that power could not be more effectively exercised than, as in this by-law, by repealing the by-laws that created them. The decision of the council to discontinue a high school district, did not, as it may be worth while here to remark, prevent the minor municipalities agreeing to remain united as one district, if that happened to be the wish of the people. The power of forming these districts was in effect transferred from the county council to the minor municipalities interested. [40 Vict. ch. 16, sec. 18, (sub-secs. 2 & 6); R. S. O., 205, sec. 30; 42 Vict. ch. 35, sec. 30.] This was a change of policy which found further expression in the Act of 1878, 41 Vict. ch. 15, to which I have to refer further on, and it is not without significance in relation to the present application.

To return to by-law 551. It proceeded to enact as follows:

"2. That these united counties shall be divided into five districts for high school purposes, composed as follows:"

Then parcelling the united counties into five districts including

*"Dundas.*

"No. 4. Morrisburgh district, embracing the townships of Williamsburgh and Winchester, and the village of Morrisburgh.

"No. 5. Iroquois district, embracing the townships of Matilda and Mountain, and the village of Iroquois."

This action was *ultra vires*, because the power of the

council to determine the limits of high school districts had ceased seven months before the by-law was passed.

I have given a good deal of consideration to the question of the effect of this by-law, and I have not been able to find any reason that satisfies me for refusing to give effect to the first section of it, which repealed the former by-laws. The council adopted a distinct mode of legislation, namely first to repeal all existing by-laws respecting high school districts, and then to re-enact such of them, or such parts of them as it intended to keep in force.

It is true the professed object was to maintain and not to do away with high school districts: but the intention, as evinced by the structure of the by-law, was, that they should owe their continued existence to that by-law, and not to those of earlier dates. With that intention the council applied the sponge to its statute book, and wiped out all the existing laws. That was an act entirely within its power. That book was its own to preserve, or to destroy. But when it assumed to re-write the laws, it went beyond its power, and I do not understand how the mistake as to the power to re-construct, can restore what there was legal power to destroy. The policy of the law does not require us to strain any principle or doctrine to deprive the repealing clause of its direct operation, for that policy was then, as it is now, to give those interested in these matters a more direct connection with the arrangement of them, differing in this respect from the policy which led to the placing of the control so largely in the hands of the councils.

In *Re Chamberlain and Stormont*, 45 U. C. R., 26, Mr. Justice Armour, in giving the judgment of the Court of Queen's Bench upon a rule to quash By-law 590, of which I have not yet spoken, said, with reference to the by-law we are considering: "By-law No. 551 never had any validity. It was passed after the repeal of 37 Vict. ch. 27, sec. 38, by 40 Vict., ch. 16, sec. 18, sub-sec. 2, and when the county council had no power to determine the limits of high school districts. I see no objection, therefore, to the

passing of the By-law No. 590 for the purpose of repealing it. It should, however, have been confined to the simple repeal of that portion of By-law 551 which relates to the county of Dundas, for the county council had not then the power to determine the limits of high school districts."

In these observations it will be observed the by-law is alluded to as simply assuming to determine the limits of the districts, in which respect it was clearly invalid, and it is only in this aspect that I understand the learned Judge to say it had no validity. The only reason for referring to it was because By-law No. 590, with which the Court was dealing, repealed No. 551 so far as it related to the county of Dundas, or in other words so far as it assumed to determine the limits of districts 4 and 5. To that extent No. 590 was held good, for the reason that to repeal what was already invalid was not a fatal fault. That being the extent of the repeal, and therefore the extent to which the Court was concerned with No. 551, it is obvious that the remark respecting No. 551 relates to that portion of it only.

The Act of 1878, 41 Vict., ch. 15, enacted that in the case of a union of counties the county council, upon the written requisition of a majority of the reeves and deputy-reeves of any one county of such union, shall constitute such county a separate county for high school purposes. \* \* and upon the like requisition the county council shall pass the requisite by-law for abolishing existing high school districts within such county, and upon the like requisition shall otherwise deal with all matters relating to the high schools therein.

This is, as I have said, a step in the direction of the policy of giving the control of their own high school arrangements to the people of the localities interested.

Assuming or intending to act under this new power, the majority of the reeves and deputy reeves of Dundas requested the county council to abolish the districts 4 and 5, and to constitute the corporation of the village of Morrisburgh High School District No. 4, and the village of Iroquois No. 5.

Thereupon by-law No. 590 was passed on 22nd June, 1878, in these words:

"A by-law of the corporation of the united counties of Stormont, Dundas, and Glengarry, to amend that portion of by-law No. 551 which relates to high school districts for high school purposes in the county of Dundas.

"Be it therefore enacted, that from and after the passing of this by-law, that that portion of the said by-law No. 551 which relates to the county of Dundas, be repealed, and the high school districts in the county of Dundas be composed as follows:

"That district No. 4, in the county of Dundas, shall embrace and be composed of the village of Morrisburgh only.

"That district No. 5, in the county of Dundas, shall embrace and be composed of the village of Iroquois only.

"All other by-laws inconsistent with this by-law are hereby repealed."

This was the by-law which was impeached in *Re Chamberlain and Stormont*, and held bad in so far as it assumed to exercise the power of which the councils had been deprived in 1877, to determine the limits of districts.

The power which, under the Act of 1878, was to be set in motion by the request of the reeves, was the power to abolish only.

Now it is worthy of note, and is I think indisputable, that, in passing No. 590, the council intended to comply with the request of the reeves of Dundas to its full extent. Two things were asked for:

1. To abolish the existing districts 4 and 5.
2. To constitute new districts bearing the same numbers.

The second request was complied with in terms; but the power was wanting, and the act was therefore held to be invalid.

The first was intended to be complied with by repealing the law by which those districts existed. That law was understood to be contained in by-law 551, which had purported to determine the limits of districts 4 and 5, after having repealed all former by-laws. Therefore the coun-

cil repealed that portion of 551 which related to the county of Dundas.

The Statute of 1878, so far as relates to the abolition of districts, conferred no new power on the council. It merely made it obligatory to exercise the power already possessed, when so requested by the reeves of one of the united counties. To say, therefore, that the council intended to do what the reeves requested in abolishing the existing districts, is merely to say it intended to obey the law.

The passage of this by-law 590 in the form in which it is framed, and in performance of the statutory obligation to abolish these districts, was a recognition and confirmation by the council of 1878 of the effect of the by-law passed by the council of 1877 in repealing by-law 516 and all the others.

Upon the whole I am not struck with any great difficulty in reading by-law 590, or rather that portion of it which was not quashed, as having the effect of abolishing the district No. 4, which existed or was assumed to exist immediately before its passing.

That it was the intention as well as the duty of the council to abolish it, I think is quite clear.

But if it is said that that intention has not been carried out by words which are apt in themselves or by reference to the preceding by-law, and that we must be governed by what is set down in terms, I say apply the same rule to by-law 551, which in plain terms repealed all previous by-laws, and so abolished the district.

Under the effect of one or both of these by-laws I am prepared to hold that in July, 1878, neither Winchester nor Williamsburgh formed part of High School District No. 4.

The learned Chief Justice of the Queen's Bench, who dissented from the judgment now in review, dwelt upon several topics on which I have not touched, and most of which I do not intend further to refer to than by observing that he made, in my opinion, a very strong case against the

granting of the mandamus. Without committing myself to the adoption, as a general rule, of the proposal of the late Chief Justice of this Court in *Re Stratford and Lake Huron R. W. Co. and Perth*, 38 U. C. R. at pp. 155-6, to deal with applications for mandamus on principles applied to cases of specific performance, which proposal did not receive the full assent of Wilson, C. J. (See *Re Brooks and Haldimand*, 41 U. C. R. at pp. 393-4), I think that for the reasons given by the learned Chief Justice of the Queen's Bench, and apart from the views I have been discussing, the interests of justice will be better served in this case by refusing than by granting the writ.

But there is one topic to which he has alluded on which I wish to say a few words.

When the demand was made in July, 1878, by-law 590 was in force. It was not finally quashed, as to the designation of the new limits, until February, 1880, and it had not been moved against until November, 1878. The Board of Education knew that the townships refused to pay, before any action was taken by the board towards the expenditure of the money. This appears from the dates of the resolutions in evidence, viz., that of 16th December, 1878, authorizing an application for a mandamus; and that of 14th February, 1879, directing the secretary to advertise for tenders, "according to plans and specifications now adopted by the board."

The board seems to have acted in the face of the litigation, and taking the risk of its being successful. Part of it, viz., this application for a mandamus, was initiated by the board. The other part, viz., the motion to quash the by-law, if not also at the instance of the board, could have been no secret from its members. If they did not know of it there was still less excuse for disregarding the by-law.

The effect of By-law No. 67 has also to be considered.

The grounds on which, if I understand the matter correctly, the judgment of the majority in the Court below was given for the issue of the writ were that by means of the resolution of the board, and the demand made on the



township, a vested right arose to insist on the contribution ; a right which remained even though the union should be severed, and—to push it to the length to which it must go—even though the township had become attached to another district, or had formed a separate district, and had to pay for building and maintaining another school.

Now I do not assent to that as the meaning or intention of the law.

Let us turn again to R. S. O. ch. 205, sec. 30, or its equivalent section as amended by 42 Vict., ch. 34. We have there the enactment on which the claim is made. It is that the money shall be provided by the high school district upon the application of the high school board, each municipality contributing its proportionate amount.

This, no doubt, refers to the District as constituted when the application is made. That is a construction as of course. But the same section declares that *nothing therein* shall prevent the county council from discontinuing any high school district theretofore formed by it.

This seems expressly to recognize the power of the council to interfere at any stage, and to discontinue the district. If it does so interfere, as it did in this case before the money was raised, I confess myself unable to see upon what suggestion of justice or of right the outlying municipalities which cease to be connected with the school, are still to be required to go on paying for it.

On 27th June, 1879, By-law 617 was passed in these words : “ Be it therefore enacted a by-law of the corporation of the united counties of Stormont, Dundas and Glengarry, that the existing high school districts in the said county of Dundas are hereby discontinued and abolished.”

If the case turned upon the effect of this by-law, I should hold that the correct view of the position had been taken by Mr. Justice Galt when he decided that nothing but the costs of the application was any longer involved in it.

The validity of this by-law cannot be seriously questioned. I have already pointed out that the right of the council to abolish any district did not depend upon a request being

made by the reeves of one of the united counties. But if such a request were a prerequisite, it will be remembered that it was made in June, 1878. That request was either complied with by the passage of by-law 590, and the districts abolished then, which I think was the case, or it remained to be complied with by by-law 617. The former alternative, viz., the abolition of the districts in 1878, leaves the application without any basis; in the latter, we have the council doing in June, 1879, what it was bound by law to do in June, 1878. That obligation had never been released. It may not be strictly in evidence that the Board of Education knew in June, 1878, of the request by the reeves; but that it did know may fairly be deduced from the facts in evidence in connection with the history of by-law 590, and the absence of any disclaimer of such knowledge by those whose affidavits are before us. Having such knowledge, the board would have to meet the charge of attempting to fasten a heavy burden upon a district which it knew the council was bound by law to abolish. The position would be like what would exist if the council had passed a by-law that two months hence the district should be discontinued, and the board had within the two months made a requisition for money to build a new school house. The Legislature can never have intended to sanction anything so unfair and oppressive.

The argument that liabilities or debts may have been incurred in reliance upon the money from the townships has no weight with me. I do not know what right a public body like the board of education has to go into debt.

But in this case there is nothing in the facts before us to satisfy me that any such thing was done. If it was done I should say that under the circumstances it was done recklessly, if not *malâ fide* and for the purpose of attempting to make a stronger case against the townships whose determination not to pay without a struggle was no secret.

We must also bear in mind that although the district is abolished, so far as "district" signifies a tract of territory

whose limits are determined by an express enactment, the school is not left unprovided for; because section 30 of R. S. O. ch. 205, prescribes the mode in which funds are to be raised for a high school in an incorporated village. I am not sure that its position would have been different if there had been a by-law expressly enacting, as was done—perhaps unnecessarily—by No. 590, that the village should be the district.

In my opinion we should allow the appeal with costs, and discharge the rule *nisi*. The defendants to have the costs of the motion before Mr. Justice Galt and of the argument in the full Court.

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## BELL V. LEE.

*Will—Insane delusion—Fraud on power of appointment.*

The decree in this cause, (28 Gr. 150,) reversed so far as the will was declared void, on the ground of insane delusion.

The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or to his brother or sister. By his will the testator gave portions, about one-fourth of his estate, to two of his children, and as to the residue he appointed the same to his brother, C. T. B., desiring him to pay first his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to a stranger the policy of assurance upon his life for \$3,000, and all moneys arising therefrom.

*Held*, that as to the portions of his estate given to his two children the will was valid; but as to the appointment to his brother, the same was void as being a fraudulent exercise of the power of appointment; and therefore that as to the residue after payment of the amounts given to the two children the will was inoperative and void, and that as to so much there was an intestacy.

THIS was an appeal by the plaintiffs, and a cross-appeal by the defendant Elizabeth Bywater, from the decree of the Court of Chancery (reported 28 Gr. 150, where the facts are sufficiently stated,) and came on for argument on the 12th of May 1881.\*

*Bethune*, Q. C. and *Moss* for the appellants Bell and Lee.

*MacLennan*, Q. C., for the appellant Bywater.

*E. Blake*, Q. C., *McCarthy*, Q. C., and *W. A. Hoskin*, Q. C., for the respondents Mrs. Bell and her children.

No one appeared for the respondent, Walter S. Lee.

On behalf of the appellants Bell and Lee, it was contended that the evidence established the fact of the testator's perfect sanity at the time of the execution of the will, and even if it shewed a delusion in the mind of the testator prior to that time, which the appellants did not concede, it was not such an insane delusion as should deprive him of all testamentary capacity when he came to execute his will. The mere existence of the belief in the mind of the testator, no matter how unfounded such belief

\* *Present*.—BURTON, PATTERSON, MORRISON, JJ. A., and OSLER, J.

might be, as to the parentage of one of the children, did not constitute any ground for concluding that he laboured under an insane delusion, and his refusal to provide for that child did not afford any reason for avoiding the will. Besides, the evidence did not shew that this was assigned as a reason why he so made his will; only as a ground for not changing its provisions. It may well be that he only gave this reason to avoid any further importunity by his friends and relations.

Counsel also submitted that the appellants should not have been ordered to pay the costs of the litigation. The more usual course should have been adopted of directing the costs of all parties to be paid out of the estate: *Williams v. Goude*, 1 Hagg. 577; *Constable v. Tuffnell*, 4 Hagg. 465; *Handley v. Stacey*, 1 F. & F. 574; *Swinfen v. Swinfen*, 27 Beav. 159; *Boyse v. Rossborough*, 6 II. L. C. at p. 44; *Trimleston v. D'Alton*, 1 D. & Cl. 85; *Waterhouse v. Lee*, 10 Gr. 176; *Martin v. Martin*, 12 Gr. 500, were referred to.

On behalf of Mrs. Bell and her children it was contended that under the will of Thomas Bell, the testator was only entitled to the income of a portion of his father's estate during his life, with power of appointment over such portion of the estate; and that he should only be entitled to devise the estate to his child or children, or to his brother or sister, or to their child or children. It was contended that the intention of Thomas Bell was that William Houghton Bell, if he left children, should only be entitled to devise the property to such children, and that he could only devise the property to his own brother or sister, or their children, in case he had no children of his own; the words of the proviso in the will being "Provided, nevertheless, that such devise shall be to his or her own child or children, or in default of such child or children, to his or her own brother or sister, or in default of such brother or sister, to their child or children." However, under any construction of that will it was contended that the will and codicil of the testator here

were inoperative, and a non-compliance with the power given to him by his father's will, as by it he was bound to elect one of the objects therein referred to, that is, either his own children, or his brother, or his sister, or their children, and that he was not authorized to devise the estate to all of such objects, or to one or more from each class of such objects, for by the use of the words "their child or children," Thomas Bell clearly shewed that his sons should not be entitled to devise the property to the child or children of the brother, and exclude the child or children of the sister; they were bound to devise to the children of both, and this had not been done by this will. It was also contended that the evidence shewed that the testator appointed the estate in the way he did under a secret agreement made with Charles Thomas Bell, that the latter would, out of the estate, pay a debt of William Houghton Bell; and the appointment was also made with the object and intention of benefiting Elizabeth Bywater, who was not an object of the power, each of which was a fraudulent exercise thereof, and rendered the whole appointment bad and inoperative. *Furwell* on Powers, 335 and 340; *Farmer v. Martin*, 2 Sim. 502; *Rowley v. Rowley*, Kay 242; *Daubeny v. Cockburn*, 1 Mer. 626; *Jackson v. Jackson*, 1 Dru. 91; *Lee v. Fernie*, 1 Beav. 483; *Reid v. Reid*, 25 Beav. 469; *Curver v. Richards*, 1 De G. F. & J. 548; and *Topham v. Duke of Portland*, 1 De. G. J. & S. 517, 568.

Counsel also insisted that it was established that the will was made under the improper and undue influence of Thomas Hawkins Lee, Charles Thomas Bell, and Elizabeth Bywater, and was obtained by undue influence; at all events that William Houghton Bell was in such a mental and bodily condition that he was unable to resist undue influence and pressure, and was incapable of appreciating the natural claims of his own family, and if a case of absolute mental incapacity was not made out, sufficient was shewn to raise a strong doubt as to his capacity, which had not been removed by the evidence of the appellants;

and that had the testator not been under delusion as to his youngest child, he might, and probably would, have devised the whole or some portion of his estate to this daughter, Clara. The respondents therefore submitted that the will and codicil were inoperative and invalid, and an insufficient appointment of the estate.

Here it was a question of fact as to whether the testator was labouring under a delusion, and as to whether he made and executed the will whilst laboring under such delusion; and the learned Judge who heard the evidence having found such fact in favour of the respondents, his finding would not be interfered with.

They also contended that although in some cases the rule is, to order the costs to be paid out of the estate where executors are propounding a will, that does not hold good where, as here, the beneficiaries are propounding, and it appeared from the evidence that their conduct was not such as entitled them to any favour. The estate was not that of the testator, who had a mere power of appointment over it; and his appointees take by virtue of the will of Thomas Bell, and take no estate from William Houghton Bell; as respects the costs, therefore, the decree should not be disturbed. *Dew v. Clark*, 3 Add. 79 & 181; *Smee v. Smee*, L. R. 5 P. Div. 84; *Greenwood v. Greenwood*, 3 Curt. App. 24, 26, 28, 29 & 31; *Banks v. Goodfellow*, L. R. 5 Q. B. 557; *Boughton v. Knight*, L. R. 3 P. & D. 64; and *Wilson v. Wilson*, 22 Gr. 39, were referred to.

In support of the cross-appeal of Elizabeth Bywater, counsel contended that the testator possessed, under the will of his father, Thomas Bell, not merely a life interest with a power of disposition by will, but the absolute interest in the estate thereby devised to him; and that she was entitled to have the insurance moneys bequeathed to her exonerated from the charge thereon out of the remaining estate of the testator, and paid to her in full; and that even if the learned Chancellor was right in holding that the testator was only an almoner under the will of his

father, and that the existence of an insane delusion in the testator's mind was proved, that learned Judge was of opinion, and the evidence established, that such insane delusion had nothing to do with the provision made for her.

That the policy of insurance bequeathed to her was not part of the estate over which the testator considered that he had only a limited power of appointment, but was the testator's own property, and the disposition made of that might well be valid, though the execution of the power was invalid. Under any circumstances the costs of the defendant Bywater should have been ordered to be paid out of the estate. There could be no doubt that the will expresses the mind of the testator in so far as she was concerned. Her presence in the suit was due to the act of the testator, and her costs should be paid out of his estate, or at any rate out of the estate which he did not receive from his father.

As the intention of the testator in regard to this defendant was clear, and as there was neither undue influence nor insane delusion in connection with the bequest to her, it was only just that, even if she were declared disentitled to the benefits intended for her, she should receive her costs out of the estate; citing *Boughton v. Knight*, L. R. 3, P. & D. at 79; *Wilson v. Wilson*, 22 Gr. at 90; *Harwood v. Baker*, 3 Moo. P. C. 282; *Banks v. Goodfellow*, L. R. 5 Q. B. 549.

March 6, 1883. BURTON, J. A.—The learned Judge who heard the evidence in this case, decided in favour of the general testamentary capacity of the testator, with the exception that I shall immediately refer to, and that the will was not obtained from him by undue influence, as alleged in the answers of some of the defendants, but he came to the conclusion that he was labouring under an insane delusion in reference to the legitimacy of one of his daughters, a point not taken on the pleadings, and he, upon that ground, pronounced against the validity of the will and codicil of the testator, and dismissed the bill which was filed to establish them.



The finding of the learned Judge upon the evidence of the solicitor who prepared the will, and the usual medical attendant, is, that the deceased knew what he was about, and was able to form and express wishes in reference to the disposition of his property, and I do not see how the finding in that respect could have been different, so that the question is narrowed to the single point, as to what is here spoken of as an insane delusion.

There is nothing whatever in the evidence to throw the slightest imputation upon the character of the testator's widow. A letter in leed was referred to on the argument, the language of which is susceptible of the interpretation put upon it viz., that she had been guilty of some impropriety which her conscience would not allow her any longer to conceal from her husband; but the answer to that letter is not forthcoming, and although her explanation of it is not very intelligible or satisfactory, it may be capable of a different meaning from that which is now put upon it, and there is nothing to shew that the deceased so regarded it at the time.

I repeat, therefore, that there is nothing in the evidence to shew that any just grounds existed for his suspicion, but it does not appear to me necessarily to follow that it was "an insane delusion." Sir John Nicholl has defined such a delusion thus:

(3 Add. 90.) "Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and wherever at the same time, having once so conceived, he is incapable of being, or at least of being *permanently*, reasoned out of that conception, such a patient is said to be under a delusion."

The testator may, in this matter, have entertained a most unreasoning, wrong-headed, and capricious prejudice, but how can it be said that it was an insane delusion. It is, unfortunately, now not possible to ascertain upon what grounds he based that opinion, whim, or notion, call it what you will, but it is quite possible that tales may have been taken to him in reference to his family, which, though

lacking in truth, may have been believed by him, and may have induced him to entertain a dislike to the daughter whose name he declined to insert in the will.

One could understand that if he had formed the opinion that the girl was dead, and that he had attended her funeral, and neither her production before him nor the arguments of his friends, could dispel that belief, that that would be evidence of an unsound mind; but how is this Court to say, with the materials before it, that the information on which he acted might not have satisfied any rational person.

A learned writer, (Browne on the Med. Jur. of Insanity, p. 24), after referring to such delusions as would not necessarily interfere with his testamentary capacity, as, for instance, a belief that the sun does go round the earth, proceeds:

“On the other hand, if a man takes an unfounded dislike to the only relation he has in the world—one who instead of deserving hatred, has done every thing which, under ordinary circumstances, is requited with affection and love—if he believes that his daughter, son, or wife, is in the habit of administering poison with every meal; that they are in the habit of measuring him for his coffin, and entertains like delusions; if he makes a will, and gives all his property to a charity, for which, in life, he has shewn no interest, or to a friend whose acquaintance he did not seem to prize, is it not evident that the delusions have influenced the disposition, and that, in virtue of that influence, it is not really his will any more than the testament of a sane man who intended to leave his property to his daughter, but who, by fraud, was induced to believe that she was dead, and left it to quite another person, would be his will. He did will this, undoubtedly, but it was only because the real state of the case was kept from his knowledge by the deceit of a third party. So in the case of the insane man, the real state of the case has been kept from his knowledge by disease.”

In these and similar cases to be found in the books, it was demonstrated that there was no foundation whatever for the opinion entertained, but how can that be said in the present case. Without the slightest imputation upon the character of the wife, I fail to see that the deceased's

entertaining such a conviction, if he did really entertain it, is any evidence of its being an insane delusion. All that can be said about it is, that nothing is shewn to warrant such an impression, but it must be borne in mind that he is not here to give any explanation.

My learned brother Patterson has, in his judgment, set out the evidence bearing upon this question, and I do not propose to refer to it here, further than to say, that I take it to be a clear principle that the general competency of the testator to make a will having been established, the burden of shewing that he laboured under an insane delusion was upon the parties impeaching it; and that they have failed to satisfy the onus that was upon them, and the will should not, therefore, upon that ground, have been set aside.

But it is urged on the part of Mrs. Bell and her children, that even if the capacity of the testator be clearly established, the disposition made of the property cannot be sustained on several grounds.

It was contended that the testator, William H. Bell, took only a life estate in the property devised, or that portion of it derivable from the will of his father, with a limited power of appointment, and that the power to appoint to any one besides his own children arose only in the event of there being no children of his own living, and that he had no power to appoint among some of his children to the exclusion of others.

Or, if he had the power to select among the three classes named, he was bound to confine himself to one class, and not to devise to persons selected from each class, and that he could not postpone the vesting of any interest so appointed. And that the appointment to Charles was in fraud of the power, because it was, in effect, an appointment in favor of Elizabeth Bywater, who was not an object of the power.

The will under which the testator derived his right to appoint is very peculiarly expressed. It is the will of the late Thomas Bell, who died in 1857, leaving two sons

Charles and William, and one daughter Emily, and was made some two years previously to his death. It directed that when his son Charles attained the age of 30, the whole estate should be divided into three parts, as nearly as possible. That each of the sons should hold one-third share in trust for the other, and the two should hold the other third for the daughter during her life. It gives to each, therefore, a life estate in one-third, and without expressly authorizing them to devise the property so given to them for life, contains a direction in these words: "Nor shall either of my said sons, or my daughter, be prevented from devising his or her, or their share or portion of the estate, so to be set apart, either before it is so set apart or afterwards, should they see fit so to do by his or her, or their last will and testament, *in any way or manner he, she, or they, may think fit*. Provided, nevertheless, that such devise *shall be to his, or her own child or children, or his or her brother or sister, or their child or children.*"

And then follows, after a clause not material, this provision: "Eleventhly. And in case of either of my sons or my daughter dying without making a will, as hereinbefore appointed, and leaving lawful issue, then and in such case, the share of such one so dying shall go to and belong to the child or children of such one so having died without leaving a will, share and share alike, if more than one. And if either of my said children die without lawful issue and without having made a will, as herinbefore appointed, then the share of such child or children so dying without issue and without leaving a will, shall go to the survivor or survivors, of my own children, share and share alike, if more than one surviving; and if only one, then to that one; subject always, nevertheless, in all cases, to the charges and conditions of all the charges hereinbefore mentioned, and also subject to the conditions hereinafter mentioned."

It is contended that the word "or," where it occurs in the above proviso, should be read, "in default of," so that the power to appoint to the brother or sister would only

arise in default of his leaving children, and to the children of such brother or sister in default of such brother or sister

I can see no good reason for placing such a construction upon the proviso. The objects of the power, in the event of the parent dying intestate, were the children, and the purpose of the original testator's will was to make a provision for their benefit, but at the same time to reserve to their parent such a power as would enable him to divide it as their wants might require, or in case of misconduct, to deprive them of any portion, and full discretion to give the whole or any portion among other designated members of his own family, to the exclusion of his own children or any of them.

Looking at the eleventh section of the will, in which he provides for an equal distribution among the children of the son or daughter dying intestate, it is quite possible that the testator may have intended that the power of appointment otherwise than among his own children should only arise in default of children, but it is pure speculation, and I do not think we should be warranted in interpolating the words "in default of," as is contended for by the respondents.

The will is, in many respects, very inartificially drawn. I need only refer to the power reserved to the daughter in this very proviso. The testator has overlooked the fact that he had two sons and only one daughter, and has restricted her to devising to her own children or her brother, not stating which, or extending it to both or either of them.

I think these objections, and also the objection as to the vesting being postponed, are not valid. The language is very general, "to devise in any way or manner he, she, or they, may think fit," provided it is to one or more of the several objects named. I see no good reason, therefore, why the appointment to Edith and Laura and his brother Charles, would not be a good execution of the power, unless it is vitiated in whole or in part by the direction that the income of three-fourths of this property should be

applied towards an indebtedness of the appointor, and that the appointment to his brother was made under an agreement with him that he would pay that debt, which would otherwise have been paid from the policy moneys, with the intention of benefiting Elizabeth Bywater, who was not an object of the power.

The first of these objections appears upon the face of the will, and the evidence clearly establishes that there was an arrangement between the deceased and Charles, under which, in consideration of the appointment in his favour, the defendant, Elizabeth Bywater, who was not an object of the power, was to receive a benefit. I do not at all doubt that this was such an exercise of the power as to render it *pro tanto* bad, as being what is technically called, a fraud upon the power.

The principle that a person having a power, must execute it *bondâ fide* for the end designed, is well established, and was forcibly enunciated by Lord Westbury, in the House of Lords in the case of *Portland v. Topham*, 11 H. L. Ca., 51: "The donee, the appointor under the power, shall," he says, "at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power,) which he may desire to effect in the exercise of the power." And Lord St. Leonards, in the same case, uses similar language: "A party," he says, "having a power like this (to appoint among children), must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, either directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straight-forward, honest dedication of the property, as property, to the person to whom he affects or attempts to give it in that character."

But to what extent are the appointments vitiated. Does it vitiate the appointment in favour of Charles *in toto*, or merely to the extent to which the fund was attempted to be diverted from its legitimate object? and does the taint extend to the other appointments made under the same will.

It appears to me that no authority has gone the length of holding that an appointment, though made under the same instrument, to other objects of the power, and not forming part of the same transaction, can be affected, but that the failure is confined to those shares which have been taken out of the common fund by means of the corrupt bargain. The apportioning of a share, though contained in the same instrument, to each child and appointee, must, I think, be regarded as a distinct and separate act, and it is not shewn that the appointments to the children in this case formed any part of the corrupt agreement, under which a benefit was attempted to be secured to a stranger. I think, therefore, that the objection must be confined to the appointment in favour of the brother, and as to that we must, I think, apply the doctrine of *Daubeny v. Cockburn*, 1 Mer. 626, and say, that the motive which influenced that appointment was one, and cannot be severed. The effect of that decision, as I understand it, is that where there is an appointment made to one of the appointees of a sum of money, out of which he is to be paid something for making it, it is quite impossible to separate the appointment by dividing it into two parts, and to say, as far as the donee was guided in his wish to provide for the appointee, it is good, and therefore the Court will support it, but so far as he wished to benefit himself by the fraud, it is bad; and for this reason, because the party in remainder might say that the donee was not actuated in the appointment by love to his child (the appointee being there one of the donee's children), or by his wish to provide for her, or at all events it was so mixed up with his own benefit that it was impossible in any way to sever the two motives, and to say how much was to be attributed to the one, and how

much to the other; and therefore the motive for his doing the act at all being a desire to benefit himself, was fraudulent, and the subsequent act dependent upon that motive set aside. In that case, the donee himself was to derive the benefit, but it is not necessary that the object should be the personal benefit of the donee of the power. If the design of the donee in exercising the power is to confer a benefit upon any other person, not the object of the power, that motive just as much interferes with and defeats the purpose for which the trust was created, as if it had been made for the personal benefit of the donee. See remarks of Kindersley, V. C., in *Re Marsden's Trust*, 4 Drew. 600.

The children in this case would, in default of appointment, have taken share and share alike. Who can say, if Charles had refused to make the promise exacted from him, any appointment in his favour would have been made at all.

As to that portion of the will, therefore, we must hold that there has been no valid appointment. Upon these points I refer to the recent cases of *Roach v. Trood*, 3 Ch. D. 429, and *Long v. Ovenden*, 16 Ch. D. 691, which are distinguishable from the case we are considering.

From what I have already written, it will be seen that I am unable to accede to Mr. MacLennan's argument in reference to the estate taken by the deceased under his father's will.

I do not know that there is any value in the policy over and above the debt for which it was pledged. No declaration is necessary upon that point as, the validity of the will being established, Elizabeth Bywater is entitled to the surplus, if any.

The decree will be varied by declaring the appointment to Charles Thomas Bell void, but declaring the will and codicil to have been duly executed, and establishing them, with the exception referred to, as the last will and testament of William Houghton Bell.

The plaintiffs have failed in their contention, and I think there is no reason for our departing from the usual rule as



to costs. Mr. W. S. Lee is also entitled to his costs, to be paid by the plaintiffs.

There is no object in making any order as to the costs of Elizabeth Bywater, as those costs would come out of the estate of William Houghton Bell, to the residue of which, if any, after paying the incumbrance upon it, she is entitled.

PATTERSON, J. A.—The object of this bill is to establish a will and codicil of William Houghton Bell. It is filed by Charles Thomas Bell, a brother of the testator, and two children of the late Mrs. Lee, who was a sister of the testator and wife of Thomas Hawkins Lee. The defendants are Walter Sutherland Lee, the executor, and who is also a trustee under the will of Thomas Bell, appointed in substitution for the trustee named in that will, the widow and four children of the testator, and one Elizabeth Bywater, to whom a life policy is bequeathed.

It will be sufficient, at present, to state generally that the estate consists of property which the testator had power to devise under the will of his father Thomas Bell, and of the life policy, and that the general effect of the will is, to devise the estate coming from Thomas Bell to Charles upon trust, as to one-fourth of it, for the testator's daughter Edith; and as to three-fourths for the plaintiffs, charged with the payment of a debt to the estate of Thomas Bell, in order to release the life policy; the plaintiffs, Rachel and Florence Lee, only taking in the event of Charles dying without leaving lawful issue; and the life policy for \$3,000 is bequeathed to Bywater. The will is dated 30th October, 1879. The codicil, which was made on the 5th November, 1879, bequeaths to Laura Augusta, another of the testator's daughters, \$200 a year from the income of the father's estate, during Charles Bell's life, and at his death the sum of \$3,000 out of that estate. No provision whatever is made for the testator's widow, or his son William Clayton Bell, or his daughter Clara Victoria Fanny Bell.

Laura is the eldest of the family, and the only one who was of age when the bill was filed. The other children, in the order of their ages, are William, Edith and Clara.

The provisions of the will of Thomas Bell, which are material at present, are found in the clause numbered *tenthly*. It is there directed that when Charles came to the age of thirty years, the estate was to be divided into three parts, one for each of Thomas Bell's three children, William Houghton Bell, Charles Thomas Bell, and Emily, who became Mrs. Lee. William and Charles were to be each trustee of the other's share during his life, and both jointly trustees for Emily during her life. But it was declared that these trusts should not prevent the parties managing each his or her own portion of the property, after a division which was provided for; and then these words were used: "Nor shall either of my said sons or my daughter be prevented from devising his or her share or portion of the estate so to be set apart, either before it is so set apart or afterwards, should they see fit so to do, by his, or her, or their last will and testament, in any way or manner he, she, or they may think fit. Provided, nevertheless, that such devise shall be to his or her own child or children, or his or her brother or sister, or their child or children."

Another clause provided that the share of any one of the three who died intestate, leaving issue, should go to the issue.

Answers were filed by all the defendants.

W. S. Lee, the executor, submits to act as the Court shall direct. Elizabeth Bywater claims, in general terms, that the will and codicil are valid, and prays that she may be paid the amount of the life policy, free from the debt charged thereon in favour of Thomas Bell's estate.

The main controversy is raised by the answers of the other defendants. They set out in some detail a number of matters which are to a great extent matters of evidence; but in three paragraphs, which I extract from one of the answers, the issues intended to be raised are presented. They read as follows:

"1. We submit that under the will of Thomas Bell, in the said bill named, William Houghton Bell, also in the said bill named, had no power to devise the estate, or any portion of the estate he derived under the said will, to any person or persons other than his own child or children, and that therefore, in any event, to the extent of such estate, the alleged will of the said William Houghton Bell in the said bill referred to is void.

"8. We believe and charge the fact to be, that the said will and codicil were not and are not the last will and testament and codicil of the said William Houghton Bell, and were not executed in manner required by law, and were not and are not valid instruments, for the following amongst other reasons: Because the said William Houghton Bell was of unsound mind and memory; because his mind and body had become so impaired and weakened by his intemperate habits that he was unable to comprehend or understand what he was doing; that he was not of a sufficient disposing mind and memory; that he did not understand or comprehend the contents or effect of the said will and codicil; that his signature thereto was obtained by undue influence and fraud, and by false representations; that he was unnaturally prejudiced against his family, and so much so that such prejudice amounted to a monomania and species of insanity, and in consequence his mind was so warped and impaired that he was unable to give due and proper consideration to the claims of his family, or to exercise a rational judgment in disposing of his property, and that if he had been in a proper state of mind he would have left his property to his family, and that he continued in the same state and condition up to the time of his death.

"10. We believe and charge the fact to be that the plaintiff Charles Thomas Bell, and his wife, and the said Thomas Hawkins Lee, and the said Elizabeth Bywater were all instrumental in influencing the mind of the said William Houghton Bell against his family, and in excluding his family from seeing him, and in persuading the said William Houghton Bell to deprive his family of the greater part of his property, and in keeping his family ignorant of his illness, and of his movements, and of the disposition he was making of his property, and they did so with the intention and for the purpose of procuring the said William Houghton Bell to dispose of his property, or the greater part of it, away from his family; and during all the time

of his last illness the said William Houghton Bell was under and subject to the influence of the four persons named in this paragraph, and was ready to do anything they told him."

The case came on for hearing before his lordship, the present Chief Justice of Ontario, when Chancellor. His judgment, delivered after the hearing, and of which we have the short-hand writer's report, deals with three questions of fact: (1.) The testamental capacity of the testator. (2.) The alleged undue influence. (3.) An idea entertained by the testator, that Clara, one of the infant defendants, was not his daughter, which idea influenced the disposition of the property, and was asserted to have been an insane delusion.

The evidence was, at all events in the first place, principally addressed to the first and second of these questions. The third seems only to have been suggested during the progress of the trial. It is not made on the pleadings otherwise than as it may be involved in the general allegation of unnatural prejudice against his family.

The first two questions were decided in favor of the will. After alluding to the evidence on the subject of testamental capacity, the learned Chancellor thus expressed his conclusion: "I think the weight of evidence is in favour of his having mental capacity at that time. In my opinion he knew what he was doing; he knew those who had claims upon him; and though he might, in my judgment, and in that of all right thinking men, have acted wrongly, still he knew well who were the objects of his bounty, and he knew the property with which he was dealing. The case of *Banks v. Goodfellow* is very explicit on that point." Then follows a passage from the judgment of the Judicial Committee of the Privy Council in *Harwood v. Baker*, 3 Moo. P. C. 282, as quoted by Cockburn, C. J., in giving judgment in *Banks v. Goodfellow*, L. R. 5 Q. B. at p. 569. Then his lordship discussed the evidence relating to the charge of undue influence, and thus summarized his opinion upon it: "I have no doubt, from the evidence,

that Lee possessed great influence over the mind of Bell. \* \* there was, no doubt, existing in Lee an influence arising from former business relations between them. No doubt, under the circumstances that existed between them, their business relations, seeing him frequently, and not being on such good terms with his brother Charles as with Lee, he would be more easily persuaded by the latter than any one else; but that would be only persuasion, what in popular phraseology would be influence, but not undue influence. It is not a domination by the will of one person over another. I will here refer, for a moment, to *Waterhouse v. Lee*, 10 Gr, 176: 'I take the law to be, that mere influence exercised by a wife or other person over the mind of a testator is not of itself sufficient to invalidate a will; that it must amount to a control over his mind, subjecting his mental will to the desire of another that the document executed as his will is not in reality the expression of *his* will, but that of another.' That, as far as I am aware, is not an over-statement of what is required to constitute undue influence." (p. 190.)

These conclusions have not been questioned on the argument before us, although formally disputed in the reasons against the appeal. Mr. Blake, who was for Mrs. Bell and Laura, and whose argument upon the issues of fact was adopted by Mr. McCarthy, as counsel for the infant defendants, conceded that it would be waste of time to attempt to induce the Court to take a different view from that taken by the Judge at the hearing. For my own part I am satisfied, after a careful consideration of the evidence, of the correctness of the learned Chancellor's conclusions, and of the failure on the part of the defendants to sustain, or even to make a strong case in support of the allegations of want of testamentary capacity and of undue influence, on which their answer was mainly founded.

Passing on to the question of Bell's idea of Clara's illegitimacy, his lordship approached the consideration of it as a question very difficult to deal with. "The question is," he remarked, "did it, in this case, amount to an insane

delusion?" and, referring to the existence of "a morbid affection of the mind which a party cannot get rid of," or an unreasoning prejudice which may in some cases amount to an insane delusion, he continued: "It may fall altogether short of insane delusion; and it may be, looking at all the circumstances, so palpably absurd as to be unaccountable except on the theory of insane delusion. That I take to be the law on the point." Then, after an examination of the evidence on the subject, his lordship read the following passage from the charge of Sir. James Hannen to the jury in *Boughton v. Knight*, L. R. 3 P. & D. at p. 69: "If a woman believes that she is one of the persons of the Trinity, and that the gentleman to whom she leaves the bulk of her property is another person of the Trinity, what more need be said? But a very different question, no doubt, arises where the nature of the delusion which is said to exist is this, when it is alleged that a totally false, unfounded, unreasonable, because unreasoning estimate of another person's character is formed. That is necessarily a more difficult question. It is unfortunately not a thing unknown that parents—and in justice to women I am bound to say it is more frequently the case with fathers than mothers—that they take unduly harsh views of the character of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them injury, or deprive them of advantages which most men desire above all things to confer upon their children. I say there is, a point at which such repulsion and aversion are themselves evidence of unsoundness of mind," and he added: "I think that truly describes, in much better language than I can use, the conviction, so far as I can find,

formed upon this man's mind. He had quite as much ground for objection to Laura and Edith, also, as to this child. Laura was older, and Edith also was older than this one; and they had behaved to him, as he said, badly, just as this child had. Yet with Laura it was overlooked, and with Edith it was overlooked; and when it was suggested that in this child it might be overlooked—that this child, called “Baby,” should be included in his bounty—this is the reason he gives, and this is the reason, as far as I can form any judgment, for disinheriting her in the will; resting upon this perfectly, to me, unaccountable idea that had taken possession of his mind; resting upon a suspicion—resting upon nothing whatever excepting upon some idea that in some way had got hold of his mind; and, in the peculiar position he was in, he had brooded over it, and arising from resentment towards the mother, not attaching the same suspicion to earlier children, but choosing to place it upon this, and without a scintilla of ground that can be even suggested for his entertaining this, excepting the unaccountable aversion that he had taken to this child, and unaccountable idea that had taken possession of his mind. It was suggested, I think by Mr. Moss, that it might be that he gave an untrue reason—that he really did not believe this, but that he chose to give that reason. I cannot agree with that. That gives no reasonable account of it. Of course, a person may give untrue reasons for a thing, and for the motives in his own mind for doing it, but nothing of that kind applies in this case. Therefore, though this point is I admit a very difficult one, my conclusion from the whole of the evidence is, that in respect of this child the will cannot stand.”

The plaintiffs, who are also the appellants, submit that this finding proceeds upon a mistaken view of the evidence as to the existence of an insane delusion, and as to its effect, if there was such a delusion, upon the disposition of the property. The respondents support the finding, while they further contend that, even if it is incorrect, there are other grounds of attack which must be fatal to the valid-

ity of the will. I refer, at present, only to the family of the testator, and not to Elizabeth Bywater, whose interest is different from theirs.

I have stated, with some fullness, the reasons given by the learned Chancellor for his judgment, in order to be able, with as much distinctness as possible, to explain in what respects my views may differ from his. I do not think there is any difference between us with regard to the doctrines of law applicable to the subject.

The passage quoted from the charge of Sir James Ilannen may, perhaps, be taken to lay down, with sufficient accuracy, the general principles to be kept in view in inquiries like the present; but his remarks were made with reference to a state of facts which were scarcely so parallel to those we have to deal with, as to justify us in adopting his language for any other purpose than as expressing those general principles.

In the case before him the paternity of the child was not disputed. The monomania exhibited itself in the parent's repulsion to his acknowledged son, arising from a delusion respecting the son's character. In our case we are not told that the testator had formed any idea unfavourable to the character or disposition of the child; but he thought she was not his child, and therefore left her out of the will.

His belief that she was not his child may or may not have been a delusion; but, if he had that belief, it was not contrary to any ordinary impulse of nature to refuse her a share of the property.

I have received from the evidence the same impression which the learned Chancellor states at the close of his judgment, viz., that the disinherison of this one of the children was due to the testator's belief that she was not his offspring, and is not to be set down to mere caprice or any other motive which he may have intended to conceal by untruly giving the other reason.

But upon the principal question, namely, the existence of the alleged insane delusion, I find myself unable to take



the same view of the evidence as that upon which the judgment proceeded.' I feel, with the learned Chancellor, that the question is one of difficulty, and I naturally hesitate before adopting a conclusion different from that which he arrived at after bestowing so much care upon the case.

There is no conflict of testimony. The question is, what is the proper inference to draw from what appears either in the oral or documentary evidence; but there is also the consideration of where the burden of proof lay.

The defendants, who impeached the will, were bound to shew affirmatively that the belief in question was delusive, and that it existed by reason of mental derangement. They failed, in my opinion, in producing evidence sufficient to establish either of these propositions.

Whether, in an action like this, the plaintiffs were bound, like a party propounding a will in the ecclesiastical courts, to give evidence, in the first place, that the testator was of sound and disposing mind and memory, needs no discussion, because such evidence was given, and we have an express finding, so far, in favour of the will. The allegation of partial insanity, as it used to be called, or monomania, or insane delusion, came from the defendants, and had to be sustained by them. This proposition is consonant with the ordinary rules of pleading and evidence, and it is probably unnecessary to cite authorities in support of it; but as the view which I take, in opposition to that acted upon in the Court below, very much depends upon its correct application, I may be excused for referring to some cases in which I have found the subject discussed in connection with the effect of monomania on the validity of wills.

In his charge to the jury in *Greenwood v. Greenwood*, in 1790, (3 Curteis Appendix), Lord Kenyon made the following observations:

"If no fraud was committed, but the faculties of the testator were in a situation in which they could exert themselves, the will is not to be tripped up because you or I or other persons would not have made the like disposition in the like circumstances. On the one hand, we are

to take care that a will made by a person not competent to make it, shall not be obtruded to the disinherison of the heir-at-law. And on the other hand, to take equal care, and be equally anxious that if the will is properly made, it shall prevail, however hard it may bear upon those who would be our favourites in equal circumstances, and how hard soever it may bear upon the interest of those whom the feelings of man and almost the ordinances of God require should be provided for. We must see only whether the will is the will or not of the testator."

And after reviewing the evidence, which was directed to the question of insane delusion respecting his brother, whom the testator supposed to have attempted to poison him, Lord Kenyon made some further general remarks, amongst which were the following :

"The conduct which he held to his brother certainly is considerably unaccountable. If whenever his brother's name occurred, instantly a fit of delirium had seized him, then I should conceive that he was not competent to make his will ; but if his mind remained entire, if he had new raised up prejudices against his brother, though upon improper grounds, yet if they were such prejudices as might reside in a sound mind ; it is hard that those prejudices should lead to conclusions unfavourable to his brother ; but hard as the case may be, it is better that a thousand hard cases should take place, than that we should remove the landmarks by which a man's property is to be decided. It is for you to look at that conduct to his brother, to see whether it is evidence of a derangement of mind, or whether only an unreasonable prejudice in which he indulged against his brother. If it be the last, that did not unfit him to make his last will and testament."

I shall next quote the language of Lord Thurlow, in *Attorney-General v. Parnther*, (1792) 3 Br. C. C. 443 :

"The course of procedure for the purpose of trying the state of any party's mind allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement ; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the

burden of proof attaches on the party alleging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers."

In *White v. Wilson*, 13 Ves. 87 (1806) Lord Erskine thus refers to Lord Thurlow's judgment:

"The rule upon this subject of lunacy has never been so distinctly stated as by Lord Thurlow in the case of the *Attorney-General v. Parnther*, 3 Bro. C. C. 441, viz: Where the party has ever been subject to a commission, or to any restraints permitted by law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the proof, shewing sanity, is thrown upon him: on the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side, which is not to be made out by rambling through the whole life of the party; but must be applied to the particular date of the transaction. A deviation from that rule will produce great uncertainty."

Lord Erskine had been counsel in Greenwood's case. In *White v. Wilson* he made some remarks respecting it which are erroneously attributed to Lord Eldon, in *Jarman on Wills*, and also in a note to the report of the *Attorney General v. Parnther*, in Eden's edition of Brown's C. C. He referred to the case as the only instance in his experience in which a verdict of lunacy had been rendered with respect to a man who, being otherwise sane, had nevertheless a morbid image in his mind upon a particular subject:

"Mr. Greenwood," he said, "was bred to the bar, and acted as chairman at the Quarter Sessions; but becoming diseased, and receiving, in a fever, a draught from the hand of his brother, the delirium taking its ground then, connected itself with that idea; and he considered his brother as having given him a potion with a view to destroy him. He recovered in all other respects, but that morbid image never departed; and that idea appeared connected with the will by which he disinherited his brother. Nevertheless it was considered so necessary to have some precise rule, that though a verdict had been obtained in the Court

of Common Pleas against the will, the Judge strongly advised the jury to find the other way; and they did accordingly find in favour of the will. Further proceedings took place afterwards, and concluded in a compromise."

In *Dew v. Clark*, 3 Addams, at p. 97 (1826), Sir John Nicholl concluded an exhaustive consideration of the principles on which cases like the present have to be tried by putting the question in the case before him thus:

"Here the question is, whether that actual aversion, or antipathy, or call it what you will, which the deceased is admitted to have felt towards his daughter, and under the present impression of which he is hardly denied to have made this will, was either founded in, or ever had any connexion with insanity at all on his part? It is whether he the deceased, at the time of making this will, had ever laboured under mental derangement, either on the subject of his daughter in particular; or, in fact, on *any* subject? It is this which distinguishes the present case from that of Greenwood; and which constitutes, at once, the novelty and difficulty of the present case—the novelty and difficulty, I mean, in point of *proof*, for really, in point of *general principle*, I do not see that Greenwood's case and the present are distinguishable."

In *Waring v. Waring*, 6 Notes of Cases, 388, 394, (1848) Lord Brougham, delivering the judgment of the Judicial Committee of the Privy Council, made these remarks:

"The burden of the proof often shifts about in the progress of the cause, according as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences. \* \* \* Thus, no doubt, he who propounds a latter will undertakes to satisfy the Court of Probate that the testator made it, and was of sound and disposing mind; but very slight proof of this, when the *factum* is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor, the party propounding, choose to rest satisfied, after an issue tendered against him, with his *prima facie* case. In this event the proof has shifted to the impugner; but his case may easily shift it back again."

In *Fowlis v. Davidson*, 6 Notes of Cases, 461, 473, (1848), Sir H. Jenner Fust thus summarizes the principles laid down in *Waring v. Waring*:

“The first principle is, that to show unsoundness of mind, it is not required that it should be general; it is sufficient if proved to exist on one or more points, though, in all other respects, the individual may conduct himself with the utmost propriety. The second is, that provided the delusion or unsoundness of mind is once proved, it is presumed to exist, although not at all times, and under all circumstances equally apparent and manifesting itself. Thirdly, when it is proved to have existed as well before as after a certain period, it will be presumed to have existed at that period, unless satisfactory proof shall be adduced that the mind of the individual had entirely recovered its former state, and had afterwards suffered a relapse. Again, in the fourth and last place, it is not necessary that the insanity should be apparent on the face of the instrument itself.”

The same principles may be found enunciated and acted upon in other cases, as examples of which I may refer to the charges to juries delivered by Sir James Hannen in the cases of *Boughton v. Knight*, L. R. 3 P. & D. 65 (1873,) and *Smee v. Smee*, L. R. 5 P. & D. 84 (1879.) In the last named case the doctrine which at present prevails upon one point is explained by Sir James Hannen as differing from that expounded by Lord Brougham in *Waring v. Waring*; the difference, however, does not affect the question of the burden of proof. The following is the passage to which I refer:

“Then arises another question, as to which, undoubtedly, there has been a difference of opinion between eminent authorities. A few years ago it was generally considered that if a man's mind were unsound in one particular, the mind being one and indivisible, his mind was altogether unsound, and, therefore, that he could not be held capable of performing rationally such an act as the making of a will. A different doctrine subsequently prevailed, and this I propose to enunciate for your guidance. It is this: If the delusions could not reasonably be conceived to have had anything to do with

the deceased's power of considering the claims of his relations upon him, and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will."

While referring to this able and comprehensive charge, I may quote another passage for the sake of the concise statement it contains of a general proposition which was evidently in the mind of the learned Chancellor when he delivered the judgment now in review, but which may, with advantage, be repeated :

"The capacity required of a testator is, that he should be able rationally to consider the claims of all those who are related to him, and who, according to the ordinary feelings of mankind are supposed to have some claim to his consideration when dealing with his property as it is to be disposed of after his death. It is not sufficient that the will upon the face of it should be what might be considered a rational will. You must go below the surface and consider whether the testator was in such a state of mind that he could rationally take into consideration, not merely the amount and nature of his property, but the interest of those who by personal relationship or otherwise had claims upon him."

I now turn to the evidence :

The testator, W. H. Bell, married the defendant, Catharine F. Bell, about the year 1855. They lived together in Toronto until 1866, if I correctly apprehend the date, when they separated, and shortly afterwards the wife went to live in Orillia. All the children who are parties to this action were born before the separation, and remained with their mother. Another child, which afterwards died, was born after Mrs. Bell had removed to Orillia. Her husband paid frequent visits to Orillia during the earlier years of her residence there. He was living in the house with her when the last child was born, and seems to have proposed at that time to go into business in Orillia; but another separation took place, and he returned to Toronto. It would be somewhat foreign to my present purpose to go into the details of the unhappy family

history developed by the evidence, and particularly by the correspondence which passed between the husband and wife in the years 1867, 1868, 1872, and 1873. It will suffice to say generally that it leads to the belief that, whatever may have been the causes of differences between them, there was not, at all events during the early years, any want of affection on the part of the father towards the children, or any distinction in this respect between Clara, who was born, I think in 1865, and the others. Soon after the first separation, the testator had formed a connection with the defendant Bywater, and lived with her. This circumstance, together with his dissipated habits, gave abundant reason for complaint against him. It is noticeable that while his letters contain much self accusation, and while those of his wife give expression to her sense of the calamities his conduct had brought upon them, there is no recrimination on his part beyond occasionally charging her with harshness or want of consideration. There is nothing to suggest misconduct on the part of the wife unless an inference of that sort should be drawn from her own letter of 5th September, 1872. The language she uses is certainly capable of inducing such an inference. I confess I cannot understand her explanation of it, which to me seems not at all to explain it. But there is this to be said: It does not necessarily point to the commission of an offence such as, at a later date, her husband imputed to her; and, as far as we can gather from the other letters before us, in the absence of the husband's reply to that particular letter, he did not at the time regard it as admitting an offence of that kind.

All the evidence respecting the testator's idea that Clara was not his daughter is that given by Thomas H. Lee; and knowing the intimacy that existed between them, one is not surprised to find that he talked to Lee about it. If I correctly apprehend the matter, the first mention of the subject, in connection with this action, was when Mrs. Bell, in her evidence, spoke of what Lee had told her had been said by her husband as a reason for leaving Clara out of the will.



Mr. Lee's account of the matter is, that five or six years before the hearing, which would make it about the year 1874, the testator first said to him that he did not think she was his child; and that from that time forward, whenever he was angry he would repeat the same thing. When asked: "Did he ever mention any occasion or reason for thinking this?" He answered: "No; I do not remember him giving me any reason; he simply said from circumstances he was pretty certain she was not his child; that was all he ever said; he never gave me any circumstances other than that." Mr. Lee did not at first think that the testator himself believed what he said; but, when the will was made and Clara excluded, he remonstrated with him on her behalf; and from his then giving that as the reason, and from his acting upon it, Lee seemed to have come to the conclusion that he really did believe it. It has been argued, and I think the suggestion found favour with the learned Chancellor at the trial, that the charge was made in the first place as a railing accusation against the wife by the husband, who did not himself believe it, but who made it in hopes that it would be repeated to her, and would vex her; and that, by force of repetition and dwelling upon it, aided by the increasing weakness of his mind induced by his evil habits, and by his enmity towards his wife, the idea had fixed itself in his mind as a truth, and had become in fact an insane delusion.

There may be nothing improbable in this as a matter of conjecture; but I cannot read the evidence so as to give it affirmative support. The notion that the only motive in making the statement in the first place was that the wife might be annoyed, and that the testator invented the story for that purpose, arises from the fact that Lee did not at first think the testator believed what he said. But I do not understand Lee to say that his incredulity as to the original sincerity of the testator continued after the will was made. When he found that, notwithstanding his remonstrances, Clara was still treated as a stranger in blood, he came to see that the testator was in earnest; and



I understand him to have then perceived that he had been himself mistaken in supposing him not to have been all the time in earnest.

At all events, I do not read the evidence as indicating that the witness supposed the testator to have worked himself into the belief which it was clear he entertained when he made the will. The questions which were addressed to the witness on his re-examination were apparently framed on the assumption that he was speaking of a belief which had newly arisen in the mind of the testator; but the answers seem to me to indicate only the recent apprehension by the witness of the good faith of the statements which the testator had made. To make this clear I shall extract a few questions and answers from the shorthand writer's notes.

"Q. You say, Mr. Lee, that he first made this statement about the child not being his somewhere about six years after the separation? A. No; I think somewhere about six years from now. Q. That was seven or eight years from the separation? A. Yes; I could not give you the precise date, but it is some years. I naturally put it down then that he had been vexed at something they had been doing. I did not really think that he believed it. I thought at the time that he said it because he was vexed. Q. And you did not really think that he believed it in his heart? A. No; I did not really think that he believed it till he was on his death-bed. Q. And then you came to the conclusion that he really believed it? A. Yes; I think that he really believed it; and often I told him, 'You should not say that, for you have no reason.' Q. But when you saw him, and the way he said it on his death-bed, you came to the conclusion that he was really satisfied in his own mind that it was so? A. I really think that he had that idea."

And then farther on :

"Q. Then for the first time the man mentioned to you his testamentary intention? A. He said he had left it all right for Edie, but he had not left anything to the other children. Q. You spoke about Baby? A. Yes; that was the time he gave his reasons, and said that Baby and Laura had behaved very badly to him, and Baby was not his own

child. Q. What did you say? A. I said, 'That is wrong; I do not think you should say that;' and I told him, he spoke of a letter that his boy had written him, and I said, I didn't know anything about that, and I did not think he did right in writing that letter to him, but I said that Laura, the girl, I thought that she merely took her mother's part, as she naturally would. Q. And Baby? A. Well, I said that I did not think that he had any reason to think that; well, he said, he had his own reasons for that. Q. And that was the only reason in reference to her that he gave, that she was not his own child? A. I think that was the only reason. Q. You were surprised at this, because you had supposed before that this was only a sort of expression, that he used an improper expression when he was vexed and angered, as people sometimes do, and make a false accusation that they know is incorrect; but you were surprised that he seemed to have impressed it on his mind until he believed it? A. *When he said it before I did not think that he thought anything about it, that he was only vexed, but my idea was afterwards that he really believed it.* Q. Your idea was, that he got it into his head rooted as a belief? A. Yes; *but at first* I did not think that he did believe it; he said it so that she should hear it, and it would vex her. Q. And afterwards you thought that he believed it? For how long a time had it impressed itself on your mind that he believed that about Baby? A. I never gave it a thought until he spoke of it about the will; when he would say it, I think I told my wife about it when he would leave, what Willie said about the baby. Q. He has said it pretty often? A. He has not said it very often to me, but he has said it several times. Q. And never acknowledged it was wrong; that it was all a false accusation? A. No."

And again:

"Q. And did you make a push for Laura? A. Yes; I appealed to him strongly to do something for Laura. Q. Did you speak of Baby? A. I spoke of both the girls; I said the girls could not make a living the same as boys, and he should not leave them without something; and he should change his mind in regard to the girls, and do something for them; and he said, 'Tell Laura to come and see me; I will do something for her, but I won't for Baby.' Q. Did he reiterate his reasons? A. I am not certain whether he did repeat his reasons. Q. What do you think?

A. I am not quite clear that he gave it; but I know that he said he would not do anything for Baby. Q. But your impression is, that he gave a reason? A. He might have given a reason, but I cannot recall to mind that he did. Q. But it was the same reason? A. Oh, there is no doubt that was the reason."

How or when the belief originated in the mind of the testator we do not know. We find him first giving expression to it nine or ten years after the birth of the child, and some seven years after his separation from his wife. He then declares that he is pretty certain of the fact "from circumstances." We do not know what the circumstances were, or when they came to his knowledge, or, indeed, that they had any real existence. But how can we say they did not exist, or had not been communicated to him, or that, even if he had received false information, it may not have been such as to create in a healthy mind the belief which he entertained? It may be, and no doubt it is true that there is nothing disclosed to justify a charge of unchastity against his wife. If that were the issue, we should be compelled to say there was no evidence in support of it. She herself denies that there was any foundation for the charge; and so such evidence as there is on the subject is against it. The correspondence proves nothing either way. But the plaintiffs do not undertake to establish the charge. The defendants assume the burden of proving that the belief under which the testator acted was an insane delusion. If it were clear that when he first made the imputation he had no reason to believe in its truth, a step might be gained towards fixing the character of a monomania upon the belief when exhibited in later times. But there in my view the evidence entirely fails. Even the silence of the testator through all the correspondence, and as late as 1874, touching this particular topic, does not strike me as of much significance, when it is borne in mind that the "circumstances" from which he formed his opinion may not have been learned by him, or may not have impressed his mind,

during the earlier period. The same remark applies to his having, in the first years of her life, made no distinction between Clara and the other children.

In none of the cases to which we have been referred do I find facts which afford substantial aid to the defendants. In *Dew v. Clark*, 3 Add. 79, and the other cases in which the asserted delusion has been held to be proved, there has always been evidence from which it appeared not only that the belief in question was erroneous, but that the existence of it was incompatible with sanity.

Having regard to the party on whom, in this case, rested the burden of proof, and to the principles enunciated in the decisions to which I have referred, I cannot avoid the conclusion that while the general capacity to make a will has been established, it has not been shewn that the belief under which Clara was excluded was what can be properly called a delusion, even if it was erroneous, much less that it was an insane delusion; and that, therefore, the will ought not, upon that ground, to have been set aside.

It therefore becomes necessary to consider the legal questions touching the effect of the will of Thomas Bell, and the disposition of the property made by the will of William H. Bell.

From the view taken of the other branch of the case in the Court below, these questions were not dealt with in the judgment, and we consequently lose the advantage of knowing what opinion the learned Chancellor formed respecting them.

Mr. McCarthy contended for the respondents, Mrs. Bell and her children, that William H. Bell took under his father's will a life estate, with a power to appoint by will: that under the proper construction of the terms in which the power is given, he, having children, could only appoint among them, and that by way of distribution only without the right to exclude any of them; or if at liberty to select among the several classes or objects named—his child or children, his brother, his sister, or their child or children

—he was bound to confine himself to one class or object, and was not authorized to devise to two or more, or to persons selected from two or more, classes or objects : that, if at liberty to select the last-mentioned class—"their child or children"—he was bound to devise to the children of both brother and sister, and could not appoint to the brother's children to the exclusion of those of the sister : that he could only appoint so as to vest the share of the appointee immediately upon his own death, and that, therefore, the appointment to Charles and Edith of the income only, postponing the vesting of the capital, was not within the power : that there was no power to appoint to persons not *in esse* as to Charles's children : and, lastly, that the appointment to Charles was in fraud of the power, because it, in effect, appropriated a portion of the estate to the benefit of Elizabeth Bywater, by charging it with the payment of the debt to his father's estate, in order to set free the life policy, whereby the devise was vitiated either wholly, or at least to the extent of the three-fourths given to Charles.

Elizabeth Bywater, although nominally a respondent, takes a position in aid of the appeal. Mr. MacLennan contended on her behalf that W. H. Bell, under his father's will, took absolutely, or in fee, the property devised to him, with an executory devise over in the event of his dying without making a will ; and that, therefore, he was not, by his will, executing a power, but was disposing of his own property ; and Mr. Bethune, in his reply for the plaintiffs, enforced the same argument.

It will be advisable to consider this contention before taking up the points made by Mr. McCarthy.

The will is dated 25th July, 1855. At that date William H. Bell had been married six or seven months. The family at home with the testator seem to have been his wife, his daughter Emily, and his son Charles. The will is divided into seventeen numbered clauses.

The first clause directs payment of debts and expenses.

The second charges the whole estate for the support of

the widow, and for keeping house for herself and Emily, and for Charles till he attains twenty-one.

The third provides, by charging the whole estate, for the support of Emily while unmarried.

The fourth creates a charge for the education and support of Charles till twenty-one, or till completion of his study for a profession or business.

The fifth makes the payment of assessments, taxes, repairs, and insurance, the first charge on the income.

The sixth gives an additional sum of £25 a year to his widow.

The seventh directs the division of the surplus income, after satisfying the foregoing charges, into two parts: William is to have one part; the other is to be invested for Charles until he is twenty-one, with power to the trustees to let him have it sooner, or to withhold it till he is thirty.

The eighth allots to Emily £30 a year in lieu of her support, if she marries before the division of the estate.

The ninth vests the estate in the executors with certain powers, amongst others the power to make leases for twenty-one years, with covenants to renew for twenty-one years more at a valued rent.

The controversy turns chiefly upon the effect of the tenth clause, which I have already partly noted, particularly when read along with the eleventh. I, therefore, extract these two clauses in full.

“Tenthly. And when my youngest son Charles comes to the age of thirty years, it is my will and desire that then the whole of my estate and effects shall be divided into three parts, as near as possible as to situation, value, and quantity, but in no instance shall farming land be split up, unless it be the twelve acres in Etobicoke, one part or share to be held by my son William Houghton Bell, as trustee to and for the use of his brother Charles for and during the life of my son Charles; and my son Charles Thomas Bell shall then become the trustee of my son William Houghton Bell for the purpose of holding the share of the property

of my son William Houghton Bell for and during his life ; and my sons Charles Thomas Bell and William Houghton Bell shall then become the trustees for the purpose of holding the share of the property of my daughter Emily for and during her life ; but the trusts of my sons so to be vested in them shall not prevent either of them or my daughter Emily from managing their own portion of the property, or from receiving the rents and profits, or from occupying the whole or any portion of his or her portion after such division takes place during his or her or their lives, provided the same be with the written consent of the said trustee or trustees ; and that no lease shall be granted unless by the written consent of the trustee or trustees, who shall have full power at any time to receive the rents and profits for the purpose of paying them over, after deducting taxes and repairs, if any such charges there be against the property. Nor shall either of my said sons or my daughter be prevented from devising his or her or their share or portion of the estate so to be set apart, either before it is so set apart or afterwards, should they see fit so to do by his or her, or their last will and testament, in any way or manner he, she, or they may think fit.

“ Provided, nevertheless, that such devise shall be to his or her own child or children, or his or her brother or sister, or their child or children.

“ But neither of my sons or my daughter shall be at liberty to encumber his or her portion of my estate, so to be set apart for them, during their lives, beyond a lease for twenty-one years, and that no such lease shall contain covenants for renewal, unless it be a covenant for renewal at increased ground rent.

“ Eleventhly, And in case of either of my sons or my daughter dying without making a will, as hereinbefore appointed, and leaving lawful issue, then, and in such case, the share of such one so dying shall go to and belong to the child or children of such one so having died without leaving a will, share and share alike, if more than one. And if either of my said children die without lawful issue and without having made a will, as hereinbefore appointed, then the share of such child or children so dying without issue or without leaving a will shall go to the survivor or survivors of my own children, share and share alike, if more than one surviving ; and if only one then to that one ; subject always, nevertheless, in all cases, to the

charges and conditions of all the charges hereinbefore mentioned, and also subject to the conditions hereinafter mentioned."

The remaining clauses, which provide for the settlement of differences, the separate enjoyment by the daughter of her share in the event of her marriage, and some other details, need not be more fully noticed. They throw no additional light upon the scheme of the will or the intention of the testator.

In my opinion the intention is manifest to give none of the children the control of any part of the corpus of the estate, beyond his or her own life, otherwise than by the power to devise. Possibly the right to make leases for twenty-one years and to agree for renewals at increased rent is an exception to this, but even that may be arguable.

Until Charles attained the age of thirty, the corpus was to remain intact, and nothing to go to the children but the income.

Even after the division, which was not to be made until Charles was thirty, and consequently not till the others were of still more mature age, the consent of the trustees was made essential to the devisees managing or occupying, or letting, or receiving directly the rents and profits of their several portions.

The argument is founded upon the statute 4 Wm. IV. ch. 1 sec. 50, which declared that whenever land should be devised in a will made by any person who should die after the passing of that Act, it should be considered that the deviser intended to devise all such estate as he was seized of in the same land, whether fee simple or otherwise, unless it should appear upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seized of at the time of making the will containing such devise.

In this case the devise is to the executors in trust. The whole estate of the testator passed to them. We do not find any words directly carrying the estate to the children.



except those in the tenth clause, and those words negative any intention to confer more than a life estate. There is no devise to William of his share. It is devised to Charles for the life of William. The expressions, "their own property," "their share or portion of the estate so to be set apart," "the share of such one so dying," and the like, are not used by way of affirmations of their ownership, but only as descriptions of the parts of the estate referred to. It is, I think, very clear that the tenth clause contains no such devise as, under the construction enacted by the statute, can be held to shew an intention to give more than a life estate.

The eleventh clause is appealed to as affording evidence of a different intention. To my mind its meaning is the reverse of that. It is true that it gives the property to the children of any one of the devisees who should die intestate, in just the same way as under the law which, at the date of the will, had been in force for four years, the real property of an intestate would have gone, and it makes very nearly the same provision as the statute made for cases where there was no will and no children. But, if the property had been understood by Thomas Bell to have been devised absolutely, this clause would have been unnecessary. I take the presence of the provision to shew that it was considered necessary in order to secure to each family, in the event of the parent dying intestate, the whole of the allotted third part of the estate, which would otherwise, on the dropping of the life, have been distributed as in the case of Thomas Bell's own intestacy.

But the eleventh clause shews more than this. The executory devise, which we are asked to find in it, is not in the event of intestacy simply. It is "in case of either of my sons or my daughter dying without making a will *as hereinbefore appointed*;" or, in other words, without devising the estate to his or her children, or brother or sister, or their children. Thus, the event on which the limitation over is to take effect is the very kind of act which Bywater now attempts to uphold. Either horn of the

dilemma seems equally fatal to her case. If devised "as hereinbefore appointed," no part of the fund could be devoted to set free her life policy. If not so devised, the estate went over by the terms of clause eleven.

The argument may be shortly answered by a general proposition, which I think will be found to be true, namely, that a devise of an absolute estate in lands, with an executory devise over in the event of the failure by the devisee to dispose of those lands by will, is an impossibility. The nature of the specified event which makes it, impossible that the lands can descend to the heirs of the devisee or that he can in his lifetime convey them in fee, contradicts by its terms the assertion of the absolute character of the estate. But if this proposition, thus widely stated, should be open to question, it is, I think, indisputable that an absolute estate cannot be said to co-exist with a limitation over upon failure to devise the lands to certain specified persons or classes.

This brings me to the consideration of Mr. McCarthy's array of objections to the valid execution of the power. I propose to confine my observations principally to the last one, viz., that which asserts the fraudulent exercise of the power.

The attention which I have given to the others has not led me to consider any of them insuperable. I shall not occupy time by discussing the views on which my impressions of those objections have been formed, because I have come to the conclusion that the direction to pay the testator's debt to his father's estate, and thus divert a portion of the fund to an object foreign to the power, coupled with Charles's agreement to do so, is fatal to the appointment of the three-fourths of the estate of which Charles is devisee, and because I do not think that any of the objections can prevail to invalidate the appointments to Edith and Laura.

The law upon the subject of the fraudulent exercise of powers is arranged with admirable distinctness by Mr. Farwell in the tenth chapter of his Concise Treatise on

Powers, and the decisions referred to which illustrate the several propositions he lays down. I may quote three or four of these propositions as embodying the doctrines applicable to the point I am now considering :

“ 1. A person having a limited power must exercise it *bond fide* for the end designed; otherwise the execution is corrupt and void: *Aleyn v. Belchier*, 1 W. & T. L. C 339; 1 Eden 132.”

“ 5. The execution may be fraudulent and void on the ground that it was made in pursuance of an antecedent agreement by the appointee to benefit persons not objects of the power, and that whether the agreement be in itself unobjectionable or not.”

“ 7. The execution is fraudulent and void if made for purposes foreign to the power, although such purposes are not communicated to the appointee previously to the appointment, and although the appointor derive no personal benefit. Appointments cannot be severed, so as to be good to the extent to which they are *bond fide* executions of the power, but bad as to the remainder, except where some consideration has been given which cannot be restored, and it has, consequently, become impossible to rescind the transaction *in toto*, and to replace the parties in the same situation, or where the Court can sever the intentions of the appointor, and distinguish the good from the bad: *Daubeny v. Cockburn*, 1 Mer. 626; *Topham v. Duke of Portland*, 1 D. J. & S. 517.”

I think the case falls within the rule which is here numbered 5.

The history of the appointment, as far as it is shewn by the evidence, must be kept in mind.

The life policy seems, from what Charles Bell tells us, to have been effected for the purpose of securing to the estate of Thomas Bell the debt owed by W. H. Bell, who always intended that when that debt should be paid off the policy was to form a provision for Elizabeth Bywater. If he hoped to be able to pay off the debt during his life, he was disappointed; but he seems always to have had the design of so disposing of the estate over which he had the power of appointment, as to secure the appropriation of a part of it to the relief of the policy.

The will which we are considering bears date 30th October, 1879. Five months earlier he had made another will which he tore up. In that will he had left the estate to Charles in trust for any issue he might have, excepting the income of one-fourth, which was to go to his daughter Edith and her issue; or, in case she and Charles both died without leaving issue, then to two daughters of Mrs. Lee: the debt to be paid out of the first three years' income, and the proceeds of the policy to go to Bywater. A year before that he had prepared a will, which he did not execute, in which he divided the estate amongst his own four children, directing each of them to pay off one-fourth of the debt, and in case of their refusal, appointing the whole estate to a son and a daughter of Mrs. Lee; and bequeathing the insurance money to Bywater.

Mr. Scott, the solicitor who prepared the last will, informed the testator that he was exceeding his power of appointment in charging the estate with the payment of the debt, and that he would have to trust to Charles's honesty to pay it off, so as to give the policy to Bywater. It is evident that the securing this object was a matter of great anxiety to the dying man, and one can easily understand that it naturally would be so. He seems to have been unwilling to leave it to Charles without an undertaking on his part. Mr. Scott's advice had been given on the occasion of the preparation of the will of 30th October, and it probably excited the fear that his wish would be frustrated: accordingly, when Mr. Scott was with him, five or six days later, when the codicil was made, a promise was obtained from Charles.

The incident is told by Mr. Scott, in his evidence, in these words: "I told Mr. W. H. Bell when I drew that first will that I did not think the charge on his estate in favour of Elizabeth Bywater was valid, that he would have to trust to his brother's honesty to pay off that policy so as to give it to this woman; and I am under the impression that this day he either said something to me, or it struck me, I think he said something in a sort of mumbling tone about

this woman, it was evidently that he was thinking of, and I said, you had better get your brother to promise that he would do that, and he said yes; and I went out into the next room where Charles Bell was, and told him what had been done, and told him it was trusting to his honour to pay this, and his brother wished him to promise that he would carry this out; and Charles Bell went into the room with me and said he would; and I think that was the only conversation; in fact, the man was too ill."

Mr. Thomas Lee mentions it also in one of his answers, where he says:

"I do not know whether 'it was after the codicil was made or not; he called Charlie into the room, and he says: 'I cannot bind you to that matter of the life insurance for Bywater, but I want you to give me your word that you will carry out what I wish in the will' and Charlie said he would; he said that would be all right."

And Charles Bell himself tells the same story very clearly and very candidly. I merely quote one passage from his evidence out of several in which it is referred to:

"Q. What did Scott say to you? A. That my brother had made a request that he would come out to me, and see if I would carry out what he did; that I would agree to carry out what he had left in his will in reference to the life insurance for Miss Bywater. Q. Which was only to be done by you paying off the debt to the estate with the estate money? A. He gave me to understand that he had left enough out of the estate to me to cover that, and that I would pay out of that that money. Q. And so free the life insurance policy for Miss Bywater? A. Yes. Q. Did you agree to Scott? A. I did. Q. And then did Scott bring you in? A. I cannot say whether Scott went in with me or told me to go in. Q. And you carried out your promise to your brother? A. Yes; I told him it was all right. Q. That you would do that? A. Yes."

This occurred about a fortnight before the death of the testator.

Now if matters had remained as they were after the execution of the will on the 30th October, we should have had an appointment which, to the extent of the amount

required to pay off the debt, which we are told is not much short of the amount of the policy, was a fraud upon the power, and which was to that extent void.

Up to that date there is no evidence of any concurrence or agreement by Charles. The proper inference is, I think, that until the 5th of November, when the codicil was made, Charles had not been spoken to on the subject. I am inclined to think that under these circumstances we should have been bound to sever, or at all events that we should have been justified in severing the intention which actuated the two parts of the appointment; and that it might have been proper to hold that the appointment was good as to all but the amount of the debt, and that as to that portion only it was invalid.

The general rule is that, where an appointment is made for a bad purpose, the bad purpose affects the whole appointment, but, as pointed out by Turner, L. J., in *Topham v. Duke of Portland*, 1 D. J. & S. at p. 572, and as shewn by the decision in that case, the general rule does not apply when the evidence enables the Court to distinguish what is attributable to an unauthorized, from what is attributable to an authorized purpose.

If we knew no more than what is disclosed by the will of 30th October, and what we may infer from the earlier wills, there might be no reason to doubt that the motive of the testator was only to benefit Charles to the extent of what the will gave him. But, in the light of what afterwards took place, the transaction takes a different colour.

The great anxiety of the testator was, as already remarked, to free the policy for Bywater. His mind had never wavered in that particular. The idea of leaving the bulk of the estate to Charles seems to have arisen shortly before the will of June, 1879, was made, and to have been due to some fresh irritation in the mind of the testator against his children, chiefly owing to a dispute about the grave where one child was buried. A letter from his son, dated 22nd May, 1879, was well calculated

to provoke or aggravate such irritation, and doubtless did so. Under the influence of these hostile feelings, the will of June, 1879, was made, in which Edith alone of all his family received anything substantial, one dollar each being given to his wife, his daughter Laura, and his son, which sums he said would amply repay them for any kindness they had shewn him; and his daughter "Baby" was to have her mourning bills paid, not to exceed \$20. The same influence prevailed when the October will was made, Edith being the only one of his family who was even named. Afterwards he was persuaded to add the codicil making some provision for Laura.

In the making of these wills two active motives are apparent, viz.: the lately arisen desire to punish his own family, and the desire, always consistently adhered to, to benefit Bywater as far as in his power. Beyond the bare fact that Charles is made the recipient of what the testator diverts from his own family, there is no evidence of any active purpose to benefit Charles. Under the terms of the power, the appointment, if made at all, was to be made within narrow limits; and when his own children were passed over, Charles was almost necessarily selected. But when we remember the leading object on Bywater's account, and the anxious care of the testator, when his confidence in what he had done had been shaken by Mr. Scott's opinion, to secure Charles's agreement, it is impossible to say that without that agreement the appointment would have been allowed to remain unrevoked. It was made in fraud of the power, and it was allowed to stand because Charles agreed to be a party to the fraud. Whether the mind of the testator, which had fluctuated under one influence and another, as shewn by the three wills which are in evidence, would have still been turned against his children, or whether he would have made any appointment at all, or would have made a different one from that in the will, or would still have let that stand, if Charles had refused his assent to the diversion of the fund, cannot be

more than matters of speculation. It is only on speculation that we can say that the will, which speaks only from the testator's death, was not influenced in the appointment to Charles and the disinherison of the testator's children by the consent of Charles to aid in effecting the purpose which the testator had most at heart, but which was, nevertheless, a fraud upon the power.

The case of *Daubeny v. Cockburn*, 1 Mer. 626, is a clear authority for holding, in this case, the whole appointment void. The words of Sir Wm. Grant, at p. 614, are particularly apposite. "It is a fraud upon the other objects of the power, who might not, and in all probability would not, have been excluded, but for this agreement. It is more particularly a fraud upon those who are entitled in default of appointment, for *non constat* that the father would have appointed at all if the child [read here "brother,"] had not agreed to the proposed terms." Other cases cited in Mr. Farwell's work, at pp. 335 and 336, I do not stop to notice, except *Reid v. Reid*, 25 Beav. 469, which I refer to as a decision that the appointment to Charles failing, the ulterior limitations are not accelerated, but fall with the previous appointment; although it is at the same time an authority upon the other points involved in this branch of the case, and is one instance in which the instrument by which the power was exercised was a will and not a deed.

I may be allowed in a few words to recapitulate my conclusions.

The effect of the will and codicil together is to divide the share of the estate of Thomas Bell into three parts:

First. The sum of \$3,000 for Laura, to be paid to her at the death of Charles, she receiving in the meantime \$200 a year from the income of the estate; which sum is obviously fixed as equivalent to the interest on \$3,000.

Secondly. One-fourth of the residue for Edith, payable also at the death of Charles, she being paid during his life one-fourth of the income which remains after paying Laura her \$200.



Thirdly. The remaining three-fourths.

The first and second appointments are not open to objection. The frailty attaches only to the third.

This part of the estate is charged in the first place with the debt, by the direction to pay it out of the income in order to release the policy.

Subject to that charge, it is to belong for his life to Charles, who is to receive what remains of the income. At his death it goes to his issue, or if he leaves none to his nieces the Lees; but, of course, still charged with the old debt, if Charles shall happen not to live long enough to pay it off.

This appointment of the three-fourths, which, if made without the privity of the appointees, would be void, at least as to the money diverted from the objects of the power, and perhaps altogether, must, in my opinion, be held, in consequence of its being made in privity with Charles, altogether void. That, I think, is the effect of the authorities.

The result is, that, except as to the three-fourths, the will is valid.

The defendant Bywater is entitled to a declaration that the documents of 30th October and 5th November are the last will and testament of W. H. Bell. The defendants Edith and Laura Bell, who take under the will, will have the benefit of that declaration; although they have not formally asked for it, but have been willing to have it declared that their father died intestate.

The decree should be varied by declaring that those two instruments are the last will and testament of W. H. Bell, but that the appointment of the three-fourths of the residue of the estate of Thomas Bell is invalid.

As to costs:

The plaintiffs, although they sustain the will to a certain extent, fail to establish any right in themselves to the three-fourth parts of the estate which they claimed. Charles Bell is, it is true, trustee also for Edith and Laura Bell, but he files the bill against them, and not on their

behalf, expressly alleging that they insist on the intestacy of their father. Mrs. Bell and her children have contested the plaintiffs' claim on the ground that, as to the three-fourths, W. H. Bell died intestate. Their opposition has been based upon two contentions, viz., that the will was invalid for want of testamentary capacity in the testator; and that, if good against that objection, it was nevertheless ineffectual as an appointment of the three-fourths, so that one way or the other there was intestacy. Upon one of their objections they succeed against the plaintiffs, who should therefore pay their costs.

I think the plaintiffs should also pay the costs of W. S. Lee. That gentleman is before us in a two-fold character. He is the executor of W. H. Bell; and the plaintiffs have failed to shew any reason why probate should not have been granted in the Surrogate Court, without the expense of this action. He is also trustee of the estate of Thomas Bell, which is the subject of the litigation. The litigation has been occasioned by the plaintiffs' claim to a part of that estate, and they should therefore pay the costs of the trustee. We have nothing to do with the right of the trustee to indemnity out of that estate in case he fails to recover his costs otherwise. He probably has that right, and, as between that estate and the plaintiffs, the latter ought to bear the burden.

Elizabeth Bywater would be entitled to her costs out of W. H. Bell's estate, and, if thought worth while, may have it so declared. But as there is no estate except what goes to her under the will, the practical effect is, that she has to pay her own costs.

MORRISON, J. A., concurred.

OSLER, J.—I am of opinion that the evidence does not establish the existence of an insane delusion in the mind of the testator, and that his testamentary capacity has not been successfully impeached. I think, however, that the appointment to the testator's brother, the plaintiff

Charles, of the three-fourths of the income of the estate, is bad as being, in the circumstances, a fraudulent exercise of the power under which it was made, and therefore that as to that appointment and the subsequent appointment of the three-fourths of the corpus of the estate the will is inoperative and void. The decree should be varied to this extent; and as the appellants substantially fail in their contention they should pay the costs of the appeal. I see no reason why these costs or the costs of the suit should be paid by those upon whom, in default of a valid appointment, the estate, which the plaintiffs have sought to recover, devolves. They sued as beneficiaries, insisting upon the appointment in their favour, and not in fulfilment of any duty, or because of any responsibility cast upon them by the will.

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## BOSWELL V. SUTHERLAND.

*Pleading—Demurrer—Accidental fire—“Act of God”—Amendment.*

The plaintiff lent P. a sum of money, for securing therepayment of which P. gave a chattel mortgage on goods ; which P. was to retain possession of, and the defendant executed a bond, conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and an action having been commenced against the defendant on his bond, he pleaded the fact of such destruction without any default on his part.

*Held*, bad on demurrer, for not negating any default on the part of P. [CAMERON, J. dissenting.]

The judgment of the Court below overruled the demurrer on the assumption that the plea had been amended according to leave given, but the appeal book did not shew the amendment to have been made, and the defence as set out in the printed case was held bad on demurrer, and the appeal by the plaintiff allowed with costs. [CAMERON, J., dissenting, who thought that under the circumstances the plea should be treated as amended pursuant to the leave granted by the Court below, and that the judgment of the Court below which was in the opinion of this Court right as it was given, should not be reversed.]

THIS was an appeal by the plaintiff from a judgment of Mr. Justice Osler.

The action had been commenced in the Court of Common Pleas on the 7th day of May, 1881, and was brought to recover the value of certain goods upon which the plaintiff had taken a chattel mortgage as collateral security for a loan of \$2,500 to Sarah and Robert Pettigrew, which goods the defendant by bond, dated the 27th October, 1876, became responsible to produce for the purpose of enabling the plaintiff to seize and sell in the event of default by the Pettigrews in payment of the mortgage.

Default was made in payment, and the goods were not forthcoming.

The defendant's third plea set up that the goods had been destroyed by accidental fire before default, without any default of the defendant ; and were not in existence at the time the plaintiff became entitled to their production.

The plaintiff demurred to this plea, and the demurrer was argued before Mr. Justice Osler on the 1st day of

November, 1881, when liberty was given to amend the plea by alleging that the goods had been destroyed without default of the Pettigrews, and the argument was proceeded with as if the amendment were then made, at the conclusion of which His Lordship gave judgment, overruling the demurrer: 32 C. P. 131.

The appeal came on to be argued on the 13th day of September, 1882.\*

*McCarthy*, Q. C., and *Eddis*, for the appellant. According to the terms of the bond, the defendant was liable for the production of the goods notwithstanding the impossibility of performance by accident or otherwise; there being no statement or provision in the bond from which any inference can be drawn, that the defendant should be excused in case of the goods being destroyed. The defendant knew that the plaintiff was lending money on the security of the goods; and it is to be assumed that he would not have done so if he had supposed that if the goods were destroyed his security would be gone. The defendant should have restricted his liability; not having done so, it must be assumed that he was taking the risk of the goods not being forthcoming. Citing *Tilt v. Silverthorne*, 11 U. C. R. 619; *Ross v. Grange*, 25 U. C. R. 396; *Paradine v. Jane*, Aleyn 26; *Atkinson v. Richie*, 10 East 533; *Ford v. Cotesworth*, L. R. 4 Q. B. 134; *Bailey v. DeCrespigny*, L. R. 4 Q. B. 185; *Wear Comis v. Adamson*, 1 Q. B. Div. 548; *Nichols v. Marsland*, 2 Ex. Div. 4; *Jones v. St. John's College*, L. R. 6 Q. B. 115, 127.

*McPhillips*, for the respondent. The defendant was not liable for the production of the goods if their production before the time for payment of the chattel mortgage expired, and so before any breach of the bond became impossible. If a person binds himself to do any act, and without default on his part the performance becomes impossible, either by accident, the act of God, or otherwise,

\**Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, JJ. A., and CAMERON, J.

the person so bound is excused from the performance thereof. Such a contract must be read with the implied condition that when the time for delivery of the goods arrives they shall be in existence. The object in giving the bond was only to guard against the sale or disposition of the goods by the Pettigrews, or their removal by them out of the county wherein they were situated. If the destruction of the goods by fire was contemplated by the plaintiff, and he did not provide for it in the bond, and thereby secure himself, it must be assumed that he was taking all the risk of their destruction by fire; in that case the defendant would not be liable for their destruction. In addition to the cases mentioned in the Court below, *Boast v. Firth*, L. R. 4 C. P. 1; *Appelby v. Meyers*, L. R. 2 C. P. 651; *Robinson v. Davison*, L. R. 6 Ex. 269; Wms. Saunders' Reports, 837; *Williams v. Lloyd*, Wm. Jones, 179; Benjamin on Sales, 2nd ed., p. 455; *Dexter v. Norton*, 47 N. Y. Rep. 62; *Clifford v. Watts*, L. R. 5 C. P. 577, were referred to.

March 24, 1883. SPRAGGE, C.J.O.—The action is against the obligor in a bond, conditioned that the obligor should produce certain chattels, or cause the same to be produced, in the event of default being made by third persons of the name of Pettigrew, in the payment of a certain sum of money, lent by the obligee to these third persons, and to secure which money a mortgage on land was given, and a chattel mortgage on these same chattels, both by the Pettigrews. The declaration alleges default in payment of the money, and that the defendant did not produce the goods. The plea on which the question turns is, that before time for payment arrived, and before the time specified in the bond for production of the chattels, "and before any breach in the said bond the said goods were destroyed by an accidental fire, without any default of the defendant; and the said goods were not in existence at the time the plaintiff became entitled to their production in accordance with the terms of the said bond." And the plea being demurred to, the

short point is, whether the destruction of these chattels by fire, in the manner pleaded, is an answer to the plaintiff's case.

I have examined all the authorities, considerable in number and in importance, that have been cited to us; but it would be unnecessary as well as tedious to refer particularly to any other than those which bear upon the question whether the covenantor or obligor is excused where the performance of the contract, possible at the date of the contract, becomes impossible afterwards, by the circumstance of that which is the subject of the contract ceasing to exist before the time fixed by the contract for its performance. Mr. Leake in his book on the Law of Contracts, p. 683, (ed. of 1878.) states the rule upon which the plaintiff relies in this case for his position, that the fact pleaded does not excuse the non-performance by the defendant of that which he had contracted to perform "Impossibility of performance caused 'by the act of God' is sometimes spoken of in English law as a special kind of impossibility affecting the obligation of contracts. It is a compendious phrase intended to include such accidents as death, tempest, and the like, which, though referable to natural causes, are beyond the control and calculation of the parties; and it is commonly used for the purpose of excluding or excepting such accidents from the contract. In the absence of such exception, express or implied, it is no excuse that a contract has become impossible by an accident or event of this nature. 'The act of God' is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is, that it was not within the contract. And it is laid down as a rule of law that in all cases of duty or liability imposed by common law, there is an implied exception of the act of God; and that the same exception applies in the construction of statutes; but that contracts are in general to be construed according to their terms, without any such implied exception; and that 'when

a party by his own contract creates a duty he is bound to make it good notwithstanding any accident by inevitable necessity.' ”

As a general proposition, this is not in the present state of the authorities to be doubted. It has however, been qualified by several exceptions. The destruction of the subject matter of the contract by fire is one exception, but is not the only one ; but as a leading case of exception, was from that cause, and as the same fact is pleaded as an excuse for non-performance in this case, I will refer first to the judgment of Lord Blackburn, in *Taylor v. Caldwell*, 3 B. & S. 830. After adverting to the general rule as established by authority ; without however otherwise either assenting to or impugning it, he goes on to say “ but this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express, or implied ; and there are authorities which, as we think, establish the principle, that where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence, as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.”

His Lordship in his very carefully considered judgment, delivered as the judgment of the whole Court after time being taken for consideration, refers with approval to the rule of the civil law, and quotes from Pothier, that “ the debtor *corporis certi* is freed from his obligation when the thing has perished, neither by his act nor his neglect, and before he is in default, unless by some stipulation he has taken upon himself the risk of the particular misfortune which



has occurred." I will quote another passage from Lord Blackburn's judgment: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

Among the cases referred to in his Lordship's judgment is that of *Williams v. Lloyd*, a very old case reported in W. Jones 179, where a horse had been delivered to a person under a promise to re-deliver it upon request; and the horse died before request made; and this being pleaded was upon demurrer held good. Another old case, *Warner v. White*, Sir T. Jones 95, was decided upon the same principle. It is thus summarized by Mr. Leake: "Where a bond was given conditioned either to pay the obligee a certain sum or to surrender a person who had been arrested to appear in an action at his suit, by an appointed day; and the person to be surrendered died before that day; it was held that the bond being intended only to secure the surrender, was discharged by the death." This case followed a still older case *Laughter v. Monox*, or "*Laughter's Case*," 5 Rep. 21. In that case the condition of a bond was, that in case the obligor should alienate certain land of his wife, he should purchase other land of equal value, or else leave to her as executrix, or by legacy, as much as the amount of the purchase money. The wife died before the husband; and it was held that the husband had the option, which of the two alternatives he should perform; and that the death of his wife preceding his own excused him from performance; the judgment of the Court proceeding upon the maxim *quia impotentia excusat legem*. These three old cases (*Laughter's*

*Case* was in the reign of Elizabeth) shew that from very early times it was the received doctrine of the Court that where performance of a contract had become impossible by the act of God the law excused performance. If the question were to arise upon the same facts now, the judgment of the Court would probably be rested, as it well might be, upon the principle that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance.

This is a perfectly intelligible principle, less wide in its application than the doctrine that performance of a contract is excused where its performance has become impossible by the act of God. To that doctrine the decided cases afford numerous exceptions ; and it would be scarcely possible I think to reconcile all the cases that have been decided under that head.

The tendency of the more recent authorities I take to be to hold a contracting party excused, by the fact of impossibility of performance occurring after the contract, through no fault of his, and that in cases not falling strictly within the principle of the subject of the contract ceasing to exist. *Clifford v. Watts*, L. R. 5 C. P. 577 and *Howell v. Coupland*, L. R. 9 Q. B. 462 and in Appeal 1 Q. B. D. 258, are cases of that kind.

These cases proceed upon a principle analogous to that upon which *Taylor v. Caldwell* 3 B. & S. 826, was decided, viz., that in contracts in which the performance depends on the bringing into existence of some given thing, a condition is implied that it should be possible that that given thing could be brought into existence ; and that in the event of that not being possible the covenantor should be excused from performance.

To these cases may be added *Appleby v. Myers*, L. R. 2 C. P. 657, where that upon which it was contracted, that work should be done was destroyed by fire ; and the case in our own Court of Common Pleas, *Chamberlain v.*

*Trenough*, 23 C. P. 497, where a lessee covenanted with his lessor to restore to him certain goods at the end of his term, and the goods having been destroyed by fire before the end of the term, without his default, the principle of *Taylor v. Caldwell* was applied. In *Howell v. Coupland*, in Appeal, *Taylor v. Caldwell*, was cited and approved of, and the principle of the decision applied to the case in judgment.

In my opinion the case before us is not (except upon a ground which I will advert to presently) distinguishable in principle from the case of *Taylor v. Caldwell*. I do not think that the defendant's bond being given to secure the re-payment of a loan of money makes any difference in principle, and taking the circumstances recited in the bond to be true in fact, there is nothing in them to take the case out of the principle upon which that case proceeded.

The plaintiff was lending money to third persons upon securities to which I have already referred; and the defendant became surety; for what? The recital shews. The chattel mortgage provided that in the event of default of payment by the borrowers, the lender, the plaintiff might seize and sell the goods and chattels mortgaged; and the bond further recited that the defendant had consented and agreed to become responsible for the production of the goods and chattels, for the purpose of enabling the plaintiff to enforce the terms of his mortgage; and the condition of the bond is simply in accordance with the recital.

There is here no guaranty that the chattels shall be in existence at the future time, when the plaintiff should be entitled to call for their production: and there is the rule that a surety is not to be charged beyond the precise terms of his engagement.—*De Colyar* on Guarantees, p. 166, and cases cited. It by no means follows from the surety contracting for the production of the chattels, that he would have been willing to extend his suretyship one step further. As it stands there is, as put by Lord Blackburn, an implied condition that the party contracting shall be excused in case before breach performance becomes impossible from

the perishing of the thing without default of the contractor. I see nothing to divest the contract in this case from that implied condition.

Apart, however from the general question, which I have so far discussed, there arises a question which may be, or may not be, only a question of pleading. The plea is, that the goods were destroyed by an accidental fire, without any default of the defendant. It does not negative default in the Pettigrews, the makers of the chattel mortgage. If the term "accidental fire" negatives default on the part of any one, the addition of the words without any default of the defendant would I suppose be mere surplusage; but if it is necessary to negative default expressly is it sufficient to negative default only by the defendant? If it is, the accidental destruction of the goods by fire, although the consequence of the fault or default of the Pettigrews, would be a sufficient excuse for their non-production. I think that it would not be an excuse. The cases seem to treat default as taking a case out of the protection afforded otherwise when the subject of a contract has ceased to exist. The words "inevitable accident," "cause over which the party had no control," and the like, are used. These and "the act of God" all seem to me to negative the idea of that being admitted as an excuse for non-performance which has been occasioned by default.

Would it be a good plea to say that the goods were destroyed by a fire which, though accidental, was occasioned by the default of the Pettigrews, and their default only, and not by the default of the defendant? It is not likely that so ingenuous a plea would be pleaded, but if it were, or if the fact were so put in a special case, it would be a good test whether a plea not negating default in the Pettigrews would be a good bar. My opinion is, that for the reason that I have indicated the plea is not good. In *Taylor v. Caldwell*, and in *Chamberlain v. Trenough*, the pleas negated default in terms, and in Lord Blackburn's quotation from Pothier the words are, "is freed from his obligation when the thing has perished neither by his act

nor his neglect, and before he is in default." My conclusion is, that the plea as it stands, not negating default in the Pettigrews, is not a good bar to the action. The judgment of Mr. Justice Osler assumes that the plea was amended according to the leave granted, and assuming that, he holds the plea good. We agree with the learned Judge that if the plea had been amended, it would have been a good plea. The omission to amend might have arisen from inadvertence; or the defendant might have advisedly elected to stand upon his plea as it is. The record standing as it does, places us in an embarrassing position. We agree with the learned Judge in his law, but it proceeds upon that which we do not find on the face of the record before us. The defendant had a right to have it there; but it is not there, why we know not.

We must, I apprehend, decide upon the record as it stands before us, and in my opinion the plea as it stands is not good. The appeal must, on that ground, and I desire to place it distinctly upon that ground, be allowed, and it must be with costs.

I desire to add, in regard to the concluding paragraph of the judgment of my brother Cameron, that he must have overlooked that part of my judgment which treats of this question of pleading, when he says that in none of the judgments of the Judges of this Court is there anything stated that would indicate that the plea in question here does not aver everything essential to make a good defence in law—that is to say, the destruction of the property by accidental fire without any default of the defendant.

Mr. Justice Osler certainly had reason to assume that the defendant had made the amendment to his plea which he had obtained leave to make, but still the assumption was a mistake. The amendment was not made; and the defendant may have advisedly elected to stand upon his plea as pleaded, without amending it. My brother Cameron says that the amendment having been allowed the defendant (he must mean the appellant) ought to have had the appeal book properly made up. The plea not having been

actually amended, the appeal book could not have been made up otherwise than as it was; and the defendant does not appear to have at any time intimated even a desire to have the matter as to which he had obtained leave to amend placed upon the record. Nor has he upon the argument of this appeal asked for leave to amend.

We cannot do otherwise than allow the appeal.

BURTON, J. A.—It would seem that the learned Judge in giving judgment in the Court below was under the impression that an amendment, which he gave the parties permission to make, had been made, and he gives judgment in favour of the plea on that assumption.

When the case was being argued in Appeal the notice of the defendant's counsel was called to the fact that the plea had not been amended, and he was asked whether it was a mistake in the books, and whether he desired to have it amended in accordance with the leave granted, but he elected to support the plea as originally framed.

If then we decided the demurrer upon the pleadings before us, we should hold it to be a good defence that the goods were destroyed without any default on the part of Sutherland alone, and the Judge at *nisi prius* might very properly refuse to receive evidence that in point of fact the loss was directly attributable to the default or negligence of the Pettigrews.

It is said that the Court must now read the plea as if it were amended, which is in effect to say that this Court should force the defendant to make an amendment in his pleadings which he does not desire to make, and which for aught we know might be fatal to his defence.

It may be that it is not necessary to the defence to negative default on the part of the Pettigrews; that is a defined and intelligible position; but in my view it is an essential element in the defence, and for want of such an averment I think the plea bad.

I understand Mr. Justice Cameron's view to be, that it was unnecessary to negative even the default of the obligee,

but that it was rather a matter to be replied. I do not so understand the law. The obligor bound himself expressly by a contract absolute that in certain events he would produce or cause to be produced the goods and chattels referred to in the bond, for the purpose of enabling the obligee to seize and sell them for the payment of his mortgage security. Whether this absolute and positive contract is controlled by or subject to the implied condition that they shall be in existence at the time when so required, is not a matter which we are now called upon to consider, but it can scarcely be urged with any seriousness that such an implied condition would extend to the voluntary destruction of the property by the obligor himself, and therefore to make out the defence it is necessary for him to plead affirmatively that the goods were destroyed without any default on his part.

That that was the proper course under the old rule of pleading, I should have thought to be perfectly plain.

I do not see how the question is affected by sec. 44 of the Judicature Act. At the trial, upon such a plea as the present, the defendant would or might insist that he had made out his defence by shewing that there was no default on his part, but if the Judge took the same view of the law as we, he would hold that the plaintiff was entitled to judgment *non obstante veredicto*; he would perform the duty which was formerly exercised by the Court in *banc*; but he could not of course enter judgment *non obstante* after the plea had been held good on demurrer.

If then the plaintiff had gone down to trial with the pleadings in the state in which we find them, the defendant would satisfy the onus that is cast upon him by shewing the fact of the destruction of the goods by fire, without any default on his part; and he might refuse on such an issue to go further and prove that there was none on the part of the Pettigrews; and this Court having held that such a plea was good on demurrer, the Judge at *nisi prius* would be powerless, the jury having rightly found that issue in favor of the defendant, and this Court

having for aught that would appear upon the record held that plea good.

If the plea had simply negatived default generally it may be that the pleading might, I do not say it would, be good; and under such an issue, if our view of the law be correct, the defendant would be bound to prove the absence of default by all the parties named; but here the defendant expressly and perhaps intentionally restricts the default to himself.

I express no opinion, although I do not mean to say that I dissent from the view entertained by the learned Judge, on the pleadings in the state in which he supposed that he was dealing with them, nor do I think our decision leads to such an absurdity as my brother Cameron imagines. We do not pretend to over-rule the reasons of the learned Judge, and for myself I abstain from expressing any opinion about the case as he supposed it was presented to him, I think we must assume upon the record as presented to us that the defendant has deliberately declined to make the amendment, but wishes us to give our judgment upon the pleadings as they stood originally, and as if the judgment below had been pronounced upon them as they then stood. All that we can look at are the pleadings as we find them and the rule for judgment.

The original pleading has not been amended, and if the record should be entered for trial it will be with that original pleading upon it, although with this judgment it would in its present shape amount to no defence. If he should now obtain again permission to amend he will go down with a plea which Mr. Justice Osler holds to be a good defence, but he will have to prove the facts which that learned Judge assumed to be in the plea upon which he supposed he was adjudicating.

I think that the appeal should be allowed, and judgment given for the plaintiff on the demurrer, with costs.

PATTERSON, J. A., concurred.

CAMERON, J.—I concur in the opinion that the obligation



of the defendant to produce the goods in question was subject to the contingency of the goods being in existence at the time their production was to be made, and as the plea in this case shews they had ceased to be, it constitutes a valid answer to the plaintiff's right of recovery. I do not think it less a valid plea because it fails to negative any default on the part of the Pettigrews as well as of the defendant, assuming that it does not in fact negative such default, but I am of opinion that the plea must now be read as if the amendment that was authorized in the Court below had been made, and if it was essential to aver that there was no neglect or default in the Pettigrews that averment was in fact made, and the judgment of Mr. Justice Osler was based on the assumption that the plea was amended so as to remove all objection to it on this ground. The substantial contest between the parties was, whether under any circumstances the destruction of the goods would form a valid answer to the plaintiff's alleged cause of action. *Primâ facie* the destruction of the property relieved the defendant from his obligation to produce it, and if anything done by the defendant or any other person destroyed the *primâ facie* effect of such destruction, the plaintiff ought to have replied that which restored or continued the defendant's obligation.

Regarding the question as one of mere pleading, it appears to me that that is the course the pleadings should have taken ; but under section 44 of the O. J. A., if proof by defendant that the property was destroyed was not sufficient *per se* in law to entitle him to succeed, he would not be entitled to judgment unless he went further in proof of the facts, till sufficient had been proved to establish that the destruction was accompanied by all the necessary incidents to give him a right in law, by reason of such destruction, to judgment. The substance of the defence was averred in the plea, and it was therefore a good plea on general demurrer, without the allegation that the fire, alleged to have been accidental, which caused the destruction of the goods, was not caused by the default of the Pettigrews.

The defendant has not assumed by his contract any responsibility for the Pettigrews, other than that if the said Sarah Pettigrew and Robert Peitigrew should make default in payment of the mortgage money, or should do any act whereby the plaintiff would at any time be entitled to enforce the provisions of their covenant, the defendant would at all times produce, or cause to be produced, the goods and chattels for the purpose of enabling the plaintiff to enforce the provisions of the said covenant. This does not amount to a covenant or undertaking that the Pettigrews would take care of the goods and not by negligence or otherwise permit their destruction.

I am, therefore, of opinion that whether the pleading is taken to be amended or not, it shews a good and valid defence. But I think the plea, should as I have already said, be treated as amended. If Mr Justice Osler is right the amendment was allowed, and the defendant ought to have had the appeal book properly made up. To take any other view of the case will produce this absurdity, that this Court will overrule a judgment, that as the case was before the learned Judge in the Court below, was according to the view of the majority, if not all, of the members of this Court hearing the appeal quite correct in law. The authorities relating to the law involved were fully considered in the Court below, and have been referred to by the other members of this Court. I do not therefore make any special reference to them, further than to say that in none of them is there anything stated by the different Judges that would indicate the plea in question here does not aver every thing essential to make a good defence in law; that is to say, the destruction of the property by accidental fire without any default of the defendant.

## MAW v. TOWNSHIPS OF KING AND ALBION.

*Negligence—Contributory negligence—Nonsuit—Withdrawing case from Jury.*

A portion of a highway which the defendants were bound to keep in repair had a trench running across it caused by water escaping from a culvert, and was allowed so to continue out of repair for a month. The deceased, while lawfully travelling along the road which he had passed over the day before, attempted to cross such trench in a waggon, from which he was thrown and killed. In an action for damages, it was alleged by the defendants that deceased was well aware of the defect in the road, if any, and at the time of the accident was intoxicated, and thus contributed to the accident. It was left to the jury to say whether the deceased had so contributed to the accident, that but for want of reasonable care it would not have occurred. The jury answered this in the negative, and rendered a verdict in favour of the plaintiff.

*Held*, [affirming the decision of the Common Pleas Division, who refused a rule *nisi* to enter a nonsuit], that the question of contributory negligence was one for the jury, and could not have been withdrawn from them.

THIS was an appeal from the Common Pleas Division. The action was instituted by Jane Maw, administratrix of William Maw, deceased, against the corporations of the townships of King and Albion, for neglecting to repair a road or highway leading between and being the boundary line between those townships by reason of which a gutter or channel had formed and had been allowed to remain across such road or highway, whereby the said William Maw, while passing along such road or highway in a waggon was thrown therefrom into such channel, and was thereby wounded and injured, and subsequently died by reason thereof.

The defendants by their statement of defence denied that the road was out of repair, or that they were bound to repair; also that they had any notice of the alleged defect or want of repair. The defendants also set up that deceased was aware of the existence of the injury to the road, but was intoxicated at the time of the accident, and unable to retain his seat in the waggon, and that with reasonable care the accident could have been avoided; and that the accident did not result from any

want of repair of the road, but from want of reasonable care and diligence amounting to gross contributory negligence.

The case came on to be tried at the Spring Assizes of 1882, in Toronto, before Hagarty, C. J., and a jury. The defendants did not call any witnesses, and the jury upon the facts proved by the plaintiff's witnesses, which appear sufficiently in the judgment, found a verdict in favour of the plaintiff and assessed damages at \$2,500; \$800 for the widow; \$300 for each of the three elder children, and \$400 for each of the two youngest children—for which amount the learned Judge directed judgment to be entered, and execution issued, together with costs of suit.

In Easter Term following the defendants moved for a rule *nisi* to set aside this verdict, and to enter a nonsuit or verdict for the defendants, which was refused.

The defendants appealed to this Court, and the appeal came on to be heard on the 6th of March, 1883.\*

*C. Robinson, Q. C., and Shepley*, for the appellants. The damages here, considering the position of the parties, are excessive. It is not disputed that the deceased and the person who was driving him were perfectly familiar with the state of the road at the place where the accident took place, and with the defect complained of, and that the defect was distinctly visible to both of them; and it is clear from the evidence that knowing and seeing the danger distinctly, they chose to assume the risk of driving over the spot, which was the proximate cause of the accident. This being so, the plaintiff has failed to prove that the accident was occasioned by the negligence of the defendants, and should therefore have been nonsuited.

The evidence not only established knowledge of the defect on the part of the deceased, but also shewed that he was intoxicated, to some extent, at the time the accident took place, and that he could have avoided the accident by the simplest exercise of caution, namely, leaving the convey-

\* *Present*:—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ. A.

ance in which he was driving and walking over this piece of roadway, had he not been intoxicated. In order to recover in an action of this kind, the plaintiff must establish that the accident was caused by the negligence of the defendants. But the evidence having established a case as consistent with the occurrence of the accident through the contributory negligence of the deceased, as with its occurrence through the defendants' negligence, a nonsuit should have been entered.

Besides, even if the road were out of repair, there was no evidence of notice to the defendants of the fact sufficient to charge them: *Nichols v. Great Western R. W. Co.*, 27 U. C. R. 382; *Rastrick v. Great Western R. W. Co.*, 27 U. C. R. 396; *Bradley v. Brown*, 32 U. C. R. 463; *Hutton v. Windsor*, 34 U. C. R. 487; *Castor v. Uxbridge*, 39 U. C. R. 113; *Byyle v. Dundas*, 27 C. P. 129; *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 168; *Lax v. Darlington*, 5 Ex. Div. 34; *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. Cas. 197; *Dublin, Wicklow, and Wexford, R. W. Co. v. Slattery*, L. R. 3 App. Cas. at 1176; *Jackson v. Hyde*, 28 U. C. R. 294; *Deverill v. Grand Trunk R. W. Co.*, 25 U. C. R. 517; *Storey v. Veach*, 22 C. P. 164; *Blackmore v. Toronto Street R. W. Co.* 38 U. C. R. 172, were referred to.

*G. H. Watson*, for the respondent. All the questions in issue were fully and properly submitted to the jury by the learned Judge who tried the case, and the jury found all the issues in favour of the respondent. No objections were made to the charge of the learned Judge to the jury, or to the questions submitted to them to be answered, and their findings thereon are conclusive. The defendants called no witnesses at the trial, and the evidence given on behalf of the respondent clearly supports the finding of the jury upon the questions submitted to them. It is true that on the trial the defendants attempted to shew that the deceased was intoxicated at the time of the accident occurring, but they signally failed. In fact there was no evidence at the trial of the intoxication of the deceased, or of any negligence on his part that contributed to the acci-

dent. The evidence proved that the road in question had been out of repair for more than a month previous to the accident; and it was the main public travelled road in that part of the two townships, and was the only road by which deceased could travel south from his residence; and the evidence further shewed that the duly appointed pathmasters of that section of the two townships had personal knowledge of the defects in the road a considerable time before the accident occurred. The mere fact that the deceased was familiar with the road, and knew of the existence of the defect therein, did not impose upon him the duty to use more than ordinary care in avoiding it. Such knowledge was a circumstance to be submitted with the other facts to the jury in determining whether the deceased had used ordinary care in passing along the road, or had been guilty of negligence in that respect, and the same was duly submitted to the jury, who found that the deceased had used ordinary care under all the circumstances, and was not guilty of negligence. The evidence also clearly proved that the road was out of repair, and that the defendants were guilty of neglect which was the proximate cause of the accident. He also contended that there was no excess in the amount of damages assessed by the jury to the widow and children of the deceased, and that the verdict was warranted by the evidence, citing *Dublin and Wick'ow R. W. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Bridges v. North London R. W. Co.*, L. R. 7 H. L. 113; *Bradley v. Brown*, 32 U. C. R. 463; *Boyle v. Dundas*, 25 C. P. 420, 27 C. P. 129; *Castor v. Uxbridge*, 39 U. C. R. 113; *Burns v. Toronto*, 42 U. C. R. 569; *Lucas v. Moore*, 3 A. R. 610; *Toms v. Whitby*, 35 U. C. R. 210; *McDonald v. Cameron*, 4 U. C. R.; *Wilford v. Berkeley*, 1 Burr. 609; *Duberley v. Gunning*, 4 T. R. 657; *Gilbert v. Berkinshaw*, Lofft, 771; *Sedgwick on Damages*, vol. ii. 653; *Addison on Torts*, 402, (3rd ed.); *Shearman & Redfield on Negligence*, 3rd ed. p. 492; R. S. O. ch. 174, secs. 497, 498, ch. 128, secs. 2 and 3.

March 23, 1883. SPRAGGE, C. J. O.—Mr. Robinson, for the appellants, concedes most properly that he is not entitled to succeed upon this appeal, unless the defendants were entitled to a nonsuit.

What was incumbent upon the plaintiff to prove was, that there was negligence on the part of the township in leaving the road in the state that it was; and that that negligence was the cause of the death of the deceased. Lord Blackburn, one of the dissentient judges, in the *Dublin, Wicklow, and Wexford Railway Company v. Slattery*, 3 App. Cas. 1155, speaking of what is called contributory negligence says, at p. 1207: "The received and usual way of directing a jury as to this, is to say, that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence he cannot recover," and agreeing that so putting the question is not logically precise, he adds, "but in the great majority of cases, in practice it is quite reasonable."

The question remains what amount of care and skill was he bound to exercise. The test which has been applied by Judges of high reputation has been, such care and skill as a man of prudence would reasonably exercise. In a late case, *Lax v. The Corporation of Darlington*, 5 E. D. 28, this language has been criticised by a very learned and able Judge, who furnishes, however, no other test by which we are to judge whether a reasonable amount of skill and care has been exercised. In that case the question of contributory negligence did not arise; and the learned Judges who commented upon the plaintiff's case and upon what would have been proper if that question had been raised, do not intimate an opinion that it was a question that could have been properly withdrawn from the consideration of a jury; and Lord Justice Brett seems to assume that it was a question proper for the jury, for, speaking of that question, he says, "that no such question could be raised against the plaintiffs unless there was evidence to support it, and unless the parties desired

that such a case should be left to the jury," and indeed after the then recent decision in the *Slattery Case* the Lords Justices would certainly not ignore the judgment of a majority of the law lords, that the question was one for a jury.

In that case 3 App. Cas. 1155 the judgment of all the law Lords expressed strong disapprobation of the verdict; and those who dissented were careful to disclaim all idea of encroaching upon the functions of the jury, and it was only under very special circumstances, as put by themselves, that they held that a case was one not proper for a jury. Lord Hatherley, one of the dissentients, gives his view of the question thus, concurring with the opinion of Mr. Justice Barry in the Court below: "When once the plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury." But he adds, concurring also in the opinion of Chief Baron Palles, that "When there is proved as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which *per se* amounts to negligence, and where it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury." Lord Coleridge, also a dissentient, puts his position concisely thus: "It is therefore, I think, the duty of the Judge to withdraw the case from the jury, if by the plaintiff's own evidence at the end of the plaintiff's case, or by the unanswered and undisputed evidence on both sides at the end of the whole case, it is proved either that there was no negligence of the defendants which caused the injury, or that there was negligence of the plaintiff which did." And the third dissentient, Lord Blackburn, p. 1216, in order, as he says, to avoid all chance of misapprehension hereafter, thinks it better to repeat that he does not think "that the cogency or strength of the evidence in support of a disputed fact justifies the Judge in directing the jury to find it. But, (he says,) I think



that where there is an admission either express or by the conduct of a cause, of a fact, the Judge is not only entitled but bound to direct the jury to act upon that admission."

It will thus be seen how very guardedly the dissentient Judges expressed themselves in regard to the cases in which this question could be withdrawn from a jury. What was said by Chief Baron Palles, and adopted by Lord Hatherley, is perhaps at first sight somewhat favourable to the defendants in this case; but the act there spoken of must be proved not only by the evidence of the plaintiff's witnesses, but as part of the plaintiff's case, or if proved in the defendants' case must be admitted by the plaintiff; and so either propounded as a fact by the plaintiff, or admitted by him as a fact; and thus, as put by Lord Blackburn, (p. 1201): "Where there is no dispute between the parties as to the truth of any particular fact, or the accuracy of any particular witness, there is no need to ask the opinion of the jury on that. For (quoting from Roll. Abr.) 'the jury is not to inquire as to that which is agreed on by the parties.'"

In the instances thus put by the three dissentient Lords there was really no question for a jury to try. The application by those learned Lords of the principles thus laid down by them to the case in judgment before them is another matter; and is not material to the case before us, any further than this, that consistently with those principles and consistently with all they say in the judgments delivered by them, they could not, with facts before them such as are before us in this case, be in favour of withdrawing the case from the consideration of the jury.

We are not driven to say that in no possible case can the question of negligence be withdrawn from the jury. Lord Cairns, then on the Woolsack, assumes that such a case might arise. He says, p. 1166: "I should by no means wish to say that a case in which such a course should be taken might not arise, and indeed had the facts in the present case been only slightly different from what they are, I should have been disposed to accede to the appellants,

argument. If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company which caused his death. This would be an example of what was spoken of in this House in the case of *The Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193. An *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction."

It is not really necessary for me to quote from the dissentient judgments in the case in the Lords. I might, with propriety, have confined myself to the judgments of the majority, but I have taken the course that I have because it appeared to me that in no view of the question could this case have been withdrawn from the consideration of the jury.

In this case the duty incumbent upon the township and the neglect of that duty were, I assume, made apparent to the jury; and they are indeed facts not questioned before us. The defence set up is, that the deceased was perfectly well acquainted with the state of the road, and that he could by the exercise of reasonable care and diligence have avoided the accident which caused his death but that he was so intoxicated that he was unable to keep his seat in the waggon in which he was driving, and that his falling therefrom caused his death; and further, that the accident was not the result of any want of repair in the road, but from the want of reasonable care, diligence, and skill; and from the reckless and imprudent conduct of the deceased and the driver of the waggon.

Upon these different points of defence, the most that can be said for the defendants is, that there was a conflict of

evidence, not from any witnesses called by the defendants, for they called none, but upon what was elicited upon the cross-examination of the plaintiff's witnesses. Those questions were for the consideration of the jury. But there was one fact which is pressed upon us by Mr. Robinson, as proving the absence of reasonable care and diligence on the part of the deceased, and which he urges made it proper to withdraw the case from the jury, that is, that the deceased ought, instead of remaining in the waggon, to have got out and stepped across this dangerous piece of road.

The argument must be, that the Judge must have seen that the remaining in the waggon was a want of reasonable care and diligence; and have seen this so clearly that he ought to have told the jury, or at least to have held, that although all the other facts in the case might be found in favour of the plaintiff, that one fact was not a piece of evidence only, but was proof of a want of reasonable care and diligence, whereby, and, as put by the defence, not by the want of repair in the road, the death was caused.

One may naturally ask how was the Judge to arrive at this conclusion. There was no evidence to guide his judgment in the matter. How was he to gauge what would be reasonable care and diligence under the circumstances. If the test were, what other men travelling along the same road had done, and were doing, he would properly assume that they acted as persons of ordinary prudence would act. Then in order to judge of the absence of reasonable care by the deceased, evidence would be necessary to shew what was the practice of others, and upon that the learned Judge had no information. The evidence does not shew that it was the practice of others to do what it is suggested it was incumbent upon the deceased to do, or that one single individual exercised the suggested prudence and caution. If evidence had been given of some person or persons having done this, it would still have been a question for the jury whether it was not an act of over-caution, and whether the omission to do it was proof of the absence of reason-

able care. How widely different is this, from the case put by Lord Cairns, which I have quoted, and from the cases very aptly put by the learned Judge at the trial of this case.

Shortly then the case stands thus. The deceased was lawfully at the place where he was, and engaged in a lawful occupation, travelling in a waggon on the highway. It was the duty of the defendants, as a municipality, to keep that highway in repair. They neglected that duty for a month or thereabouts, leaving unrepaired a hole or trench worn across the road, the passing of which in a waggon was attended with some difficulty and some danger. This was gross negligence on the part of the defendants. It caused inconvenience to all using the road; its use was not unattended with danger; it involved liability to accident; and as the event proved to accident resulting in death. Now, how is this case met by a suggestion that the deceased ought to have done what is not shewn to have been done by one individual using the road? What was there in the case, as presented to the learned Judge who tried it, that could warrant him in saying that the death of the deceased was caused by or contributed to by the negligence of the deceased, and withdrawing it from the consideration of the jury? If the *Slattery* case had never been adjudged, he could not have done so. Still less could he do so with that authoritative declaration of the law upon this question. Opinions may differ as to whether the jury ought not, upon the evidence before them, to have found for the defendants. That is not the question. The question (I say it at the risk of repetition) is, whether for the reason suggested the learned Judge could have withdrawn the case from the jury, and have nonsuited the plaintiff. In my opinion he could not.

The appeal ought, therefore, in my judgment, to be dismissed, and with costs.

BURTON, J. A.—There was abundant evidence, if believed by the jury, to establish the fact which they have found, that the highway in question was out of repair, and that

it was the cause of the accident which led to the death of the deceased ; and it became necessary for the defendants therefore, if they relied upon it as an answer, to establish the deceased's contributory negligence affirmatively. It would be competent for the Judge in a case of contributory negligence, as it would be in proving the negligence of the defendants in the first instance, to hold that there was no sufficient evidence to go the jury to support the issue ; but I do not understand that it is competent for him to declare affirmatively in the one case more than in the other, that the case is proved. It is still a matter in dispute whether the injury was wholly attributable to the negligence of the defendants, or whether the want of proper care on the part of the deceased or his driver materially contributed to it.

I had occasion, recently, in the case of *Neill v. The Travellers' Insurance Company*, 7 A. R. 570 to point out the importance in cases of this nature of considering carefully upon whom is the onus of proof, and one is a good deal aided in such matters in remembering how the case would be properly presented on the pleadings. All that the plaintiff is bound to allege is the negligence or breach of duty on the part of the defendants causing the accident ; but it was never necessary to negative negligence on his own part, and the plaintiff makes out a *prima facie* case by shewing negligence on the defendants' part.

It may, of course, happen that in attempting to make out his case the plaintiff may shew that in point of fact the accident was in no degree caused by the defendants' negligence, but wholly by his own negligence ; in such a case the plaintiff fails to establish what he had undertaken to do, and the Judge's duty would plainly be to nonsuit. But where the plaintiff has given evidence upon which a jury may fairly come to the conclusion that the defendants were guilty of negligence which may have caused the accident, but there is also evidence, (and it is immaterial whether that evidence comes out during the examination, of the plaintiff's witnesses, or is given on the part of the

defence,) that the plaintiff was guilty of negligence contributing to the accident, how can the Judge take upon himself to deal with the one class of evidence more than the other? He may hold that there is no evidence fit to submit to the jury to establish the contributory negligence, and tell them, therefore, that the only matter for consideration is, whether the defendants were, in this particular case, guilty of negligence; but he cannot hold the facts proved, and direct a verdict.

The fourth reason of appeal shews how impossible it would have been to enter a nonsuit.\* When the defendants allege that the plaintiff should not recover because the proximate cause of the accident was the intoxication of the deceased, and not the defect of the highway, the very statement of the proposition in this way shews how impossible it was to withdraw the case from the jury. I do not wish to be understood as meaning that upon an admitted state of facts, shewing that the plaintiff was guilty of conduct which, *per se*, constituted negligence contributing to the accident, a case would not be presented calling upon the Judge to exercise his functions, and hold, as a matter of law, that the action could not be sustained; but that is a very different matter from taking upon himself to usurp the functions of the jury, and decide disputed facts, which is really what we are asked to do in the present case.

This was the only question argued, and for the reasons stated I think it is not tenable, and that the appeal should be dismissed, with costs.

PATTERSON, J. A.—Three questions were left to the jury, and were all answered in favour of the plaintiff:

“ 1. Did the defendants keep this highway in such a state of repair as was reasonably safe and sufficient for the ordinary travel of the public? A. No.

“ 2. If they did not keep it in such reasonably sufficient

\* The 4th reason of appeal was as follows: “ The plaintiff should not recover, because the proximate cause of the accident was the intoxication of the deceased and not the defect in the highway.”

repair, was the death of deceased caused by their neglect so to do? A. Yes.

“3. Did the deceased, by himself or his driver, Thomas Phillips, by want of reasonable skill and care, so contribute to the happening of the accident that, but for such want of reasonable care, the accident would not have happened? A. No.”

Judgment having been given for the plaintiff upon these findings for the damages assessed by the jury, the defendants moved in the Divisional Court for an order *nisi* to set aside that judgment, and enter a nonsuit or judgment for the defendants, on the ground that there was not sufficient evidence to warrant a recovery by the plaintiff against the defendants, on the ground that the deceased was well aware of the defect in the road now relied on by the plaintiff as ground of recovery, and knowing it drove into it, and was guilty of contributory negligence; and on the ground that there was no evidence of notice to the defendants, or either of them, of the defect in the road; or why a new trial should not be had on the ground that the verdict is against law and evidence, and the weight of evidence, and that the damages are excessive. The Court refused the rule.

The only question which we have now to consider is, that of the alleged contributory negligence. The others were either disposed of on the argument, or were not renewed before us.

The fact was clear, and was not disputed, that the defect in the highway, which was a sort of rut or trench running obliquely across the road, caused by water that had been prevented by an obstruction in a culvert from flowing through the culvert, and which defect had existed for more than a month, was known to the deceased and to his companion Phillips, who was driving when the accident happened. They had crossed it the day before when going from home, and when the deceased was thrown from the waggon they were recrossing it on their return home, in daylight, or at all events while there was light enough to

see by. Witnesses called for the plaintiff shewed that the crossing of the trench was attended with some difficulty and danger, but they had all got over it safely, even with loaded waggons. No one seems to have been deterred by it from passing that way, and no one seems to have suffered from it.

The contention for the defendants is, that under the circumstances the Judge ought to have ruled that the deceased was shewn by the undisputed facts to have contributed by his own negligence to the accident, and to have nonsuited the plaintiff; and we were told that the defendants intended by their defence to test the question whether in all cases the issue of contributory negligence must necessarily be left to the jury.

That question probably is one which may be said to be still unsettled; but I do not think the present case calls for its decision.

It is not always easy to trace the limit where the office of Judge ends, and that of the jury begins, in cases like this. The onus being upon the plaintiff to shew that the injury complained of was caused by the negligence of the defendants, not merely that the defendants were negligent and that but for their negligence the injury would not have happened, the evidence given in support of the case may well be so inconclusive, or may so clearly indicate that the plaintiff contributed materially to the disaster in question, as to bring the evidence, as a whole, within the well established rule in *Ryder v. Wombwell*, L. R. 4 Ex. 32, as being evidence on which the jury could not properly find that the *causa causans* was the defendants' negligence. I think Lord Coleridge laid down a sound and practically useful rule, when he said, in *Slattery's Case*, 3 App. Cas. 1194, "If there are, as there are, classes of cases (such as those, *e. g.*, in which railway companies or infants are defendants) in which juries are inclined to be guided rather by feeling than by law, it is very important in such cases that no fear of not properly respecting the functions of a jury as to matters within their province, should make a



Judge hesitate to withdraw from the jury matters which are by law without it." And I have been struck with the felicity of a remark of Mr. Justice Stephen in the recent case of *Watkins v. Rymill*, 10 Q. B. D. 190: "It is in one sense a question of fact, but it is a question of fact to which, by law, one answer only can be given, and this is the same thing as a question of law."

These, *dicta*, probably go as far as any that can be cited in the direction of what the defendants here contend for. The contention is that it should be held, as a proposition of law, that when a man travels along a highway which he knows to be to some extent out of repair, he takes the risk on himself; and if an accident happens to him or his vehicle, notwithstanding his taking all reasonable care in the use of the highway, he can have no recourse to the municipality by whose negligence the danger was created or allowed to exist.

The extent of the want of repair is a matter of degree only. The rule must apply, if at all, to slight defects as well as to serious ones. Take, for example, the facts in *Walton v. Township of York*, lately before the Common Pleas Division, 30 C. P. 217, and before this Court 6 A. R. 181. A farmer, driving as carefully as he can, is upset at night by his wheel getting into a ditch made for the necessary purposes of drainage along the side of the travelled way, but which was so deep as to be dangerous, and had been negligently left unfenced. To tell the farmer, who knew the condition of the road, that he must travel it at his own risk, because it was possible that with all his care and caution something might happen which would turn his wheel into the ditch, would be to lay down a rule obviously impracticable, and entirely unsuited to our circumstances.

It may, of course, be said that that case and this are so far from parallel, that while the farmer sets out to drive along the good roadway, and only gets into the dangerous ditch by a casualty, the attempt in the present case was to drive through the ditch itself. But the difference does not touch the point in discussion, which is the obligation, as a

matter of law, to keep out of the way of all the danger you know of, on peril of having to bear all the consequences. It may be said with great force that in one case the danger was slight or remote, and in the other obvious and unavoidable if the road was used ; but that raises only the question of comparative prudence in driving along the road in the one case or the other, and that is a question for the jury and not for the Judge.

The municipality, which is bound to provide a sufficient highway, permits this one to be in a dangerous state. does not by any act, or even in intention, warn people not to use the road. It in effect, invites them to use it ; because having the duty to maintain a highway in that place, it provides no other road than this. There is fully as much reason for saying that the municipalities assumed the risk in this case, as for saying it was assumed by the deceased.

The observations of Bramwell, L. J., in *Lax v. Darlington*, 5 Ex. D. 34, respecting the case of *Clayards v. Dethick*, 12 Q. B. 439 and *Wyatt v. Great Western R. W. Co.*, 6 B. & S. 709, shew the inclination of the opinion of that very eminent Judge in the direction of the doctrine now asserted on the part of the defendants. I do not gather, from the general tenor of his remarks or the illustrations he gives, that he had in his mind the existence of a duty such as that cast by law upon our municipalities.

But without entering into a discussion of the question he was considering, it is sufficient to say that in the present case, while I should, if in place of the jury, have most likely found it difficult to believe that the deceased could possibly have been jerked from the waggon if he had been as alert and careful as Philips the driver said he was, that very difficulty would prove the propriety of leaving the case to the jury, and the impossibility of saying as a matter of law that the attempt to pass over the rut in the waggon was in itself contributory negligence.

I agree that we must dismiss the appeal.

MORRISON, J. A., ~~concurrent~~

*Appeal dismissed, with costs.*

## HOWARTH V. SINGER MANUFACTURING COMPANY.

*Incorporated foreign company—Appointment of agents and sub-agents—  
Yearly hiring—Wrongful dismissal.*

The defendant company was a foreign corporation, whose directors had authority to appoint such subordinate officers as the business of the corporation might require. By power of attorney under the corporate seal, they appointed a general agent at Toronto, to take charge of, conduct and manage the business of the agency at Toronto and of its sub-agencies, giving him power to do everything necessary and requisite to all intents and purposes as fully as the company could do. He appointed the plaintiff a sub-agent for a year, and at the end of that and each succeeding year he renewed the appointment for a year. The plaintiff was paid \$15 a week and a commission on sales. He was summarily dismissed. Evidence was given for the defence that the corporation were in the habit of appointing their agents and sub-agents at will.

*Held*, SPRAGGE, C.J.O., dissenting, [affirming the judgment of the Court below refusing an order *nisi* for a non-suit,] that the appointment from year to year was clearly within the authority of the directors, that the general authority was delegated to the general agent, and that the plaintiff had a right to rely upon the authority so given when he entered into the engagement.

*Per* SPRAGGE, C.J.O. Though the defendants acquiesced in the appointment of the plaintiff, there was no acquiescence in the terms of the appointment, and it appeared that their practice was to engage their agents at will only. The power of attorney, if it gave power to appoint sub-agents at all, did not give power to appoint them by the year; and the general agent was not held out by the company as having any such authority.

THIS was an appeal by the defendants from the judgment of the Court of Common Pleas, discharging a rule *nisi* to set aside the verdict obtained by the plaintiff, under the circumstances stated in the judgment.

The power of attorney mentioned in the judgment, and under which Robert C. Hickok had assumed to appoint the plaintiff a sub-agent of the defendant company, was in the following words :

“ Know all men by these presents, that we, the Singer Manufacturing Company (a corporate body duly incorporated under the laws of the State of New Jersey), have made, constituted and appointed, and by these presents do make, constitute and appoint Robert C. Hickok, of Toronto, Ontario, Canada, our true and lawful attorney, for us, and in our name, place and stead, to take charge of, conduct and manage the business of our agency at Toronto, Ontario, Canada, and of its sub-agencies; to open an account with some bank or banking-house there; to make deposits therein to our credit; to indorse notes, cheques or drafts for deposit or collection for said account, and to sign checks drawn against the same; and in our

name to execute and deliver any bond or bonds of indemnity, or for appeal, or which may seem to him requisite or advisable upon our part in any proceedings at law or in equity; and giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present, hereby ratifying and confirming all that our said attorney shall lawfully do, or cause to be done, by virtue hereof.

“ In witness whereof we have caused this instrument to be attested by our president, and our corporate seal to be hereunto affixed, at our office in the city of New York, this 16th day of October, in the year one thousand eight hundred and seventy-nine.

“ THE SINGER MANUFACTURING CO.

“ By EDWARD CLARK, *President.*”

The appeal came on to be argued before this Court on the 14th of September, 1882. \*

*G. H. Watson*, for the appellants.

*C. Robinson*, Q. C., for the respondent.

*Hughes v. The Canada Permanent Building Society*, 39 U. C. R. 221; *Wingate v. Enniskillen Oil Co.*, 14 C. P. 379; *Crampton v. Varna Railway Co.*, L. R. 7 Ch. 562; *East London Water Co. v. Bailey*, 4 Bing. 283; *Campbell v. The National Life Ass. Co.*, 24 C. P. 133; *Watts v. Alliance Mutual Life Ass. Co.*, 45 U. C. R. 561; *Montreal Ins. Co. v. McGillivray*, 13 Moo. P. C. 87, were referred to.

The points relied on by counsel appear in the judgment.

March 24, 1883. SPRAGGE, C. J. O.—The plaintiff has recovered a verdict as upon an engagement of him by the defendants for one year, from the 12th February, 1880, and the question is whether it was such an engagement of the plaintiff as is binding upon the company.

There was no employment of the plaintiff directly by the defendants. The engagement was by one R. C. Hickok, and was by letter dated 14th December, 1879, addressed to him; in which the writer says: “Your

\* *Present.*—SPRAGGE, C. J. O., BURTON, PATTERSON, and CAMERON, JJ. A.

engagement will continue for another year, from February 12th next ; salary fifteen dollars per week, and a commission of five per cent. on all moneys remitted to Toronto, and one dollar on any sale you may make in person." The letter was signed "The Singer Manufacturing Company, per R. C. Hickok, agent." There had been two previous yearly engagements of the plaintiff, by letter from the same person, signed in the same way ; the compensation being fifteen dollars a week, and a dollar on each machine sold by him. The plaintiff's employment, as expressed in the first letter written to him was "to run the Windsor office;" and what is called a "territory" was assigned to him, consisting of three counties in the western part of Ontario.

The defendants do not appear to have been ever informed of this yearly engagement. Hickok himself says that he never informed them of it. It appears to have been the practice of the company to engage all their agents and servants at will; and that it was not supposed that the plaintiff was any exception. Hickok himself was so engaged.

Hickok was appointed attorney of the company to take charge of, conduct and manage the business of their agency at Toronto, and of its sub-agencies. The appointment is under the seal of the company, and is dated 16th October, 1879. It is not shewn under what authority he acted previous to that date.

The defendants are incorporated under an Act of the Legislature of New Jersey ; and the Act authorizes the directors of the company to appoint such subordinate officers as the business of the corporation might require.

The plaintiff's sub-agency was one of those referred to in the power of attorney to Hickok.

It is not material in my view of the case to consider whether it pertained to the office to which Hickok was appointed to appoint the sub-agents of his agency, or to the directors of the company. The appointment of the plaintiff was acquiesced in by the company, so far as his acting as a sub-agent was concerned; but no acquiescence is shewn in the terms of his appointment, beyond the weekly and specific

compensation ; no acquiescence in the yearly engagement, and no knowledge, and no reason to suppose that there had been such engagement, but the contrary.

The power of attorney, if it gave him power to appoint sub-agents at all, did not give him power to engage them by the year. It was the practice of the company to appoint at will only ; and this was known to Hickok, as appears by the evidence of Oscar Graham ; and Graham as well as Hickok held their offices only by that tenure.

As between Hickok and the company, therefore, the engaging of the plaintiff for a year was without authority ; and it was as appears by the evidence of Graham in contravention of an arrangement assented to by Hickok, that he was to employ no one without Graham's consent.

The question remains whether by any act of the company they held Hickok (their agent for some purposes) out to the world as having authority to engage sub-agents by the year. The plaintiff knew that he was an agent only. The only authority that he had to shew was the power of attorney. That document is silent as to the appointment of sub-agents. Assume for the moment that it gave to Hickok power to appoint them. The plaintiff took an appointment at a weekly salary. That by itself without more would import a weekly hiring, but Hickok in his letter tells him , " your engagement will continue for another year." Did the power of attorney import that Hickok had authority to engage for a year, paying a weekly stipend, or in other words to engage a sub-agent at so much a week, and that the engagement should be for a year. If the plaintiff succeeds, it must be because the power of attorney imports this.

I incline to think that it does not. Such an appointment of sub-agents is not essential to the management of such a sub-agency. This appears from the fact that the agencies and sub-agencies of the company are all managed, with the single exception of the plaintiff, by agents appointed at will. Further it is a departure from us age

where the payment of salary or wages is by the week ; and the language of the power of attorney cannot be taken to import the giving of authority to make an exceptional or unusual bargain.

The case most in the plaintiff's favour of any that I have met with, is that of *Davis v. Marshall*, reported in vol. 9 of the Weekly Reporter, p. 520, where the plaintiff was engaged as manager of a shop of the defendants, at a salary of £30 a year, payable monthly, with a commission on his sales, and house rent. It was held to be a yearly hiring. The distinction is, that the hiring there was at a yearly salary. Here at a weekly salary, with an agreement by Hickok that he should be employed for a year.

In England there is a presumption of yearly hiring more than there is in the United States, or in this province, but still in England the presumption upon the naked case of a hiring without time specified, and with wages payable weekly, is that it is a weekly hiring.

It appears to me, however, that this case is not governed by the cases of hiring servants, whether domestic servants, clerks or others ; but comes nearer to a class of cases referred to in Mr. Wood's book on the law of Master and Servant, at p. 271, and which he puts thus : " If the master does not have *entire control* over the servant for the whole time, as if he is permitted to work for others when he is not working for him, the hiring is not regarded as a yearly hiring," and for this *Regina v. Ravenstonedale*, 12 A. & E. 73, is cited : " Nor when the servant is only required to work a certain number of hours each day, whether the number of hours he shall work is regulated by the contract, by custom, or by positive statute, although he is paid by yearly salary, it is not regarded as a hiring for a year," and for this *Regina v. Northowram*, 9 Q. B. 24, and *Rex v. Edgmond*, 3 B. & Al. 107 are cited. The cases are not very accurately summarized. The last, however, appears correct. The point is this. The plaintiff was not engaged as a servant in any shape, as a clerk, or in any capacity which entitled his employer to his entire services at any

time ; but he remained his own master at liberty to employ his time as he pleased, he was simply an agent with certain prescribed duties.

Such being the nature of the employment of the sub-agents of the company, I do not see that it was necessarily or even fairly to be inferred from the terms of the power of attorney held by Hickok, that he had the authority of the company to engage that sub-agents appointed by him should hold their appointments for a year. We have no evidence of usage in relation to appointments of that or the like character. The only evidence we have upon that point is, the usage in the defendants' own company ; and that is against the plaintiff. My own impression is, that looking at the terms of Hickok's power of attorney, and the nature of the employment of sub-agents, a person dealing with Hickok in the matter of such appointment could not reasonably infer that he had such authority ; in other words, the defendants did not hold Hickok out to the world as possessing such authority.

There is nothing in the plaintiff having on two previous occasions been appointed by Hickok for a year, the defendants not having notice of such appointment. They only knew that the plaintiff had served them for so long a time, at a certain weekly stipend, and a specific compensation.

I have not so far touched the question whether Hickok had power of appointment of sub-agents at all. His assenting to an arrangement that he should not appoint them without the approval of Graham, looks as if it were assumed that but for such arrangement the appointment would lie with him. Apart from that, I should say, that his appointment to take charge of, conduct, and manage sub-agencies would not necessarily carry with it authority to appoint the sub-agents. The defendants are, it is true, a foreign corporation, but the intercourse between New York, the "head quarters," as Mr. Graham says of the company, and Toronto is so easy and constant, and so rapid, that such appointments might readily be made at



headquarters. They would not necessarily be a part of the function of the agent at Toronto. I desire, however, to express no decided opinion upon that point, as it is not necessary in my view of the case.

Upon the whole, the inclination of my opinion has been that there should have been a nonsuit. This opinion is shaken, certainly, by the fact of my learned brothers thinking differently, and by the reasons given by them for the conclusion at which they have arrived. But after again considering the question, the inclination of my opinion still is, that there should have been a nonsuit.

BURTON, J. A.—The defendants are a foreign corporation doing business in this country, through agents, the purposes of the corporation being to manufacture and sell sewing machines and articles used therewith, and to carry on any business incident thereto.

The business is to be carried on by six directors, who are authorized to make by-laws for the management and government of the corporation, and to appoint such subordinate officers as the business of the corporation may require.

There can be no question that the appointment of officers holding positions similar to that held by the plaintiff was essential to the carrying out of the business in which the defendants were engaged, and they were aware that he had been appointed to the position by their general agent in Toronto, although they were apparently not aware of the term for which he had been appointed.

There is no restriction in the Act of incorporation upon the power of the directors to make appointments for any length of time they may think proper. They, it is true, go out of office at the end of each year, but it is every day practice for railway and other directors, whose tenure of office is in all respects similar, to make engagements of managers and other officials extending for a much longer period, and no question ever arises as to the validity of such appointments.

The course pursued by these defendants residing or having their head office in New York, was to appoint under their corporate seal an attorney in Canada to conduct and manage the business of their agency in Toronto, and of its sub-agency, "giving and granting unto him full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in about the premises, as fully to all intents and purposes as they might do if present." This power is dated 16th October, 1879.

This attorney appears to have been acting as agent for the defendants for a long time previous to the execution of the power of attorney, for we find him in 1877 engaging the plaintiff for a year, again in February, 1879, an engagement for another year, and then the engagement in question.

The authority granted to the attorney is in as general terms as that held by the directors themselves in this particular matter viz. : to take charge of, conduct and manage the chief agency and its sub-agencies. These sub-agencies were created by the agent so appointed, and all parties acquiesced in the view that such sub-agencies were essential. It is clear, therefore, that the appointment of the sub-agent was within the scope of his authority. If the defendants desired to limit that authority, it was their plain and obvious duty to do so in the power of attorney, and not by secret instructions of which the party dealing with the agent knew nothing and had no means of ascertaining.

This is a case of a general agent employed for his principals to carry on their business, that is the business of selling sewing machines, and the person dealing with such an agent would, if he required to see the power of attorney, see that his powers were of the most general character. I quite agree that if there had been any restriction in the power of attorney itself, the party dealing with him might possibly have been affected although he had no actual notice of them ; but there is no room for speculation in the

present case, authority is conferred in the most general terms, and it would to my mind be contrary to every principle of justice to enable these defendants now to say: "True, we gave those full and general powers to our agent, but that was not the mode in which we were in the habit of transacting our business, and we gave our agent instructions not to make contracts of that kind."

In such a case good faith requires that the principals shall be bound by the acts of the agent done within the ordinary scope of the employment in which he is engaged as such agent. How is a stranger to know whether the custom of the company is to make engagements at will or for a limited period?

A foreign corporation is not entitled to have the law construed differently from what we should hold it to be in the case of a company incorporated under our own laws; if there could be any difference it should be more stringently construed in favour of the party dealing with the agent, inasmuch as there is no means of readily verifying by inquiry from the principal the extent of the agent's authority.

It may be that it was the practice of the company to make no other contracts of this nature than those determinable at will; but I venture to doubt whether they would have been able to carry on a business successfully under such a rule; they certainly could not hope in that way to attract the best business ability, and at all events this plaintiff was engaged on each occasion by the year, and had no notice of any limitation of the agent's authority. If the defendants desire to carry on their business on different terms, that is their own affair, but they should not be allowed to do so to the detriment of third parties who in good faith enter into contracts with their agents.

I may say that I have seldom met with a more unsatisfactory appeal book. There is nothing to shew what the verdict was, or how the jury were directed, and there is no reference whatever to the judgment of the Divisional Court. We must, therefore, decide upon the meagre mate-

rials before us whether there was any reason for acceding to the defendants' motion for a nonsuit, and in refusing to give effect to such motion I think the Divisional Court were correct, and that their judgment should be affirmed.

I proceed shortly on the ground that it was clearly within the scope of the authority of the directors to engage this plaintiff for a year, that they gave the same general authority to their agent, and the plaintiff had a right to rely on the authority so given when he entered into the engagement.

The appeal should, in my opinion, be dismissed, with costs.

PATTERSON, J. A.—This action was tried before the learned Chief Justice of the Common Pleas and a jury. The plaintiff had a verdict, and the Court of Common Pleas afterwards discharged a rule *nisi* which the defendants had obtained to set aside that verdict and to enter a nonsuit, or for a new trial on the law and evidence and for misdirection. There is no note in the appeal book of any motion for a nonsuit, or of the charge of the learned Chief Justice to the jury; and the appellant has been equally reticent with regard to the judgment of the Court. Indeed it is only by inference from the form of the rule *nisi* that we learn what the verdict was.

Coming before this Court with so meagre a statement of what occurred in the Courts below, the defendants who appeal are necessarily confined to the contention that there was no evidence proper to be left to the jury, and that therefore the plaintiff ought to have been nonsuited.

If we were trying the action and had to find upon the facts, there would be undoubtedly something to be said on the part of the defendants. Whether or not a full consideration of the whole evidence would lead my mind to the conclusion that the plaintiff ought to recover, or that he ought to fail, I have not now to decide. It is enough for the disposal of the present appeal that there is something to be said for the plaintiff, and that that something was proper to be pronounced upon by the jury.

The defendants, a foreign corporation, had agencies and sub agencies in Canada. By a sub-agency I understand an agency which is under the management or control of a more general agency, which is itself under the jurisdiction of the managing body of the corporation.

The company's Act of Incorporation, of which evidence was given, contains a clause which enacts that the directors may appoint such subordinate officers as the business of the corporation may require.

The directors, acting in the name of the company, did accordingly appoint Robert C. Hickok, of Toronto, by a power of attorney, dated 16th October, 1879, to be "our true and lawful attorney, for us, and in our name, place and stead, to take charge of, conduct and manage the business of our agency at Toronto, and of its sub-agencies," with certain other powers of which I need only quote the general power "giving and granting unto our said attorney full power to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as we might or could do if personally present."

This was not the first appointment of Hickok. He had held the same position for several years. The appointment of October, 1879, was to the same position from which he had been discharged the day before.

Hickok had in December, 1877, acting in the name of the defendant company, employed the plaintiff as sub-agent at Windsor for one year at \$15 per week, and \$1 on each machine sold to the territory belonging to the Windsor office. The offer of this engagement was in writing in the form of a letter addressed to the plaintiff by the defendant company per R. C. Hickok, agent.

By a similar note dated 12th February, 1879, the plaintiff was engaged for a second year on the same terms; and on the 14th December, 1879, the plaintiff received another written promise signed like the former two, that his engagement should continue for another year, from 12th February, 1880, and repeating the terms.

He acted under that engagement till the 26th June, 1880, when he was discharged. He was not aware of any limitation of Hickok's authority as representing the company.

These are, I think, the facts shewn by the evidence adduced in support of the plaintiff's case, though one fact, viz.: the Act of Incorporation, which I do not treat as a fact in dispute, I take from the evidence given for the defendants.

If the case had rested here, and upon this evidence a verdict had been rendered for the plaintiff, I do not understand on what grounds we could say it was unsupported by legal evidence.

We could not say that the conduct and management of the sub-agencies of the Toronto agency did not necessitate the employment of sub-agents, and we could not say that the Toronto agent was not the man to appoint them; and in fact these two points are not in dispute.

A servant, whether he be called a sub-agent or anything else, must be engaged on some terms. The company could engage its servants on whatever terms were agreed upon; and Hickok was authorized to do everything necessary to be done in and about the execution of the general power given to him as conductor and manager of the sub-agencies, as fully to all intents and purposes as the company might or could do if personally present.

That Hickok could bind the company by any contract within the scope of his power of attorney, executory as well as executed, without necessity for the corporate seal of the company to authenticate the contract, is clear from many modern cases. I need only refer to *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, and the other cases cited by me in *Wright v. London Life Assurance Co.*, 5 A. R. 225.

For these reasons I think there could not properly have been a nonsuit entered at the close of the case for the plaintiff.

It was true that the defendants were at liberty to move

for a nonsuit at any stage of the case. But even when all the evidence was given, their application would not, as it strikes me, have rested on much stronger ground.

The additional evidence was only to the effect that the custom of the company is to appoint all its servants at will only. At least, one witness says that. The other, who was called on the same point, said they were employed by the week only. Both agreed that the system was to pay them weekly. One witness spoke of Hickok having been informed expressly that he was not to employ people on any other terms ; but Hickok denies having received any such instructions. No one says the plaintiff ever was told of the alleged rule.

I do not attempt to discuss the relevancy of this evidence, because it is clear that it was for the jury and not for the Court to deal with, and therefore could not be used by the defendants, on whose behalf it was given, as aiding their application for a nonsuit.

I say nothing of the effect in evidence of the employment of the plaintiff year after year, and of the knowledge which, it might be found, the defendants must have had that he was so employed. I do not mean employed for the term of a year at a time, for that may have been known only to himself and Hickok, but that he was there as a sub-agent appointed by Hickok. I think there was evidence enough, as against a nonsuit, of Hickok's power to make the appointment, without the plaintiff having to resort to the implied recognition of the appointment by the defendants.

For these reasons I am of opinion that we ought not to disturb the judgment of the Court below, but that we should dismiss the appeal, with costs.

CAMERON, J.—I concur in the opinion that the appeal in this case should be dismissed, with costs, for the reasons given by my learned brothers Burton and Patterson.

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## MURRAY V. MCCALLUM.

*Married Woman's Act—Separate property—Separate trading.*

In order that the property of a married woman who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate and apart from her husband, or that the business should be carried on in a house other than that in which the husband and his wife reside.

The plaintiff, who was possessed of a sum of money (about \$300), felt dissatisfied with her husband's management of his business, his goods having been sold under execution for debt whilst residing on a rented farm, the sale not realizing sufficient to pay the arrears of rent and his debts; leaving, in fact, unpaid the debt for which the defendant in the present action had obtained execution. The husband had literally no means, and the plaintiff resolved to start hotel-keeping, and agreed to give her husband \$15 a month for his services as bar-keeper, the duties of which he discharged, and resided with her in the hotel. It was shewn that whilst thus engaged she had two partners in carrying on the hotel business. The defendant seized the goods in the hotel, and in an interpleader issue a verdict was rendered in favour of the plaintiff, which the Court in *banc* refused to set aside. On appeal to this Court.

*Held*, per SPRAGUE, C. J., and CAMERON, J., that the facts shewed the plaintiff to have had a separate trade or occupation within the Act, the husband not having the control of the business, but being hired for a particular duty.

*Per* BURTON, J. A.—It was not intended that there should be an inquiry under the Act as to the *bona fides* of such transactions; but that the fact of the husband's interference with the concurrence of the wife, deprived it at once of its separate character.

*Per* BURTON and PATTERSON, JJ. A.—That the interference of the husband with the business, as shewn by the evidence, was such in reality as to prevent its being treated as the separate business of the plaintiff.

THIS was an interpleader issue directed to try whether certain goods seized by the sheriff belonged to the claimant Elizabeth Murray, a married woman, as against the defendant.

The plaintiff was examined at the trial, which took place at Owen Sound, before Morrison J. A., and a jury, in April, 1881. She stated that she was married in 1870, at which time she had a house and lot in Alton, and a small sum of money: had about \$150 at the time of her marriage after paying for her marriage outfit, &c.; had followed sewing as an occupation before marriage: that her husband had been seized upon about eight years ago, when they were living on his father's farm in Esquesing; he was sold out, and she sold the lot which she owned. She then took a tavern stand



at Alton, which she kept for about eighteen or twenty months ; during this time her husband went to Red River, and was absent about five months; after that she purchased a place at Holstein, in the townshship of Normanby, paying the owner \$300 for his right, and carried on business there for about two years, when she went to Owen Sound, and went into business there in partnership with one Felcher, on equal terms, each putting in half the capital; her share, including furniture, &c., being estimated at \$800, Felcher putting in an equivalent in money and goods; and they carried on the business for about ten months, when they dissolved, she agreeing to pay him \$1,000, the amount agreed to be taken or given by one party to the other. This amount she paid with \$400 she had brought from Alton, the proceeds of the land she had there; \$500 she borrowed from one Leslie; \$50 from Mrs. Kennedy, and \$50 she took from the till belonging to the house; \$300 of the borrowed money she still owed, having borrowed some to pay Leslie. After carrying on the business for about a year alone, she entered into partnership with one Sproule, in January, 1880, which continued until the following autumn, when they dissolved, and a memorandum of the dissolution was indorsed on the deed of partnership which was produced. The sheriff, she stated, seized everything that was in the hotel, up to which time she had continued to carry on the business by herself. All the property seized she swore was hers, acquired by her from time to time. Her husband lived with her all the time with the exception of the five months he was at Red River. Before commencing to keep tavern, "I told him," she said, "he was not a success, and I would try it myself, and I would give him \$15 a month, and he could mind the bar, and I would attend to the other;" and this arrangement continued until he went to Red River, when he gave her a receipt up to that date, and when he came back she allowed him the same amount until she removed to Owen Sound, when she agreed to give him \$25 a month. This money that he got out did not go into the business. "He drew the money

out as he wanted it, and it was marked. We have had no settlement since that but once since we came to Owen Sound. He has got the money as he wanted it since."

Felcher was also called as a witness, and stated substantially the same as the plaintiff had sworn to as to selling out his interest, and that he had received the \$1,000 in cash from Mrs. Murray. Felcher further stated that before entering into the partnership Mr. Murray had consulted him on the matter, and that he told Murray to go down to his place and see what he had there. Then the agreement was brought forward, and after having a talk with him he went and got the house ready, and went to Toronto and purchased certain goods and went into the business. The writings were drawn up in July; they were not different from the original agreement. "He gave me clearly to understand that I was to have no business relations with him, that it would be entirely with Mrs. Murray. He intimated that when he first came \* \* he said: 'you understand any partnership you go into is with Mrs. Murray; she is carrying on this business, and she owns what is here'; she was there at that moment," He further stated that after the business had been going on for some time, Mr. Murray produced an article which read something like this: "We the undersigned, Mrs. Murray and Felcher, agree to hire David Murray for the sum of 50 cents a day, and board him and his children," and he was to be in every respect his own boss; witness did not approve of signing that, and said: "If you are going to work here under a salary, why certainly you cannot be your own boss; you have to be subject to my orders." For the first six months there was not any written agreement as to the partnership. He, (Felcher,) was principal landlord in one sense of the word: "I attended to the business principally, with the exception of the domestic department; Murray was there subject to my orders; he acted as bar tender, and man in general; there was an hostler kept; Murray was not the hostler; I would go behind the bar sometimes; there was a cash box and a till; I would receive the money and he would receive the money; I generally attended to

closing up the house, and I would take the money to my room ; he had a key to my room, and he would get up in the morning and come and get it. \* \* When accounts were brought in I would pay them, and if he happened to be there he would pay them out of the week's receipts. \* \* We calculated to go principally on a cash system. \* \* I did not assent to his being allowed to command wages and be his own boss ; I had no differences with him. \* \* When he was on duty he had the same authority as I had, from the fact that that was what he was there for ; his wife had the same authority that I had ; he and she were not joined for their half ; he had no right to dictate to me ; she confined herself to the domestic part of the work ; he and I attended to the bar ; as far as outside persons could see he had as much to do with it as me."

Sproule was also examined, and proved that during his partnership there were horses bought ; also a bus and harness. " My work there was to do the general work of a hotel. I carried on the business as a partner ; Murray was acting, too, just in the same capacity. He and I had all the hotel-keeper part of the business. We were the managers and bosses. She had her duty to perform ; it was superintending the domestic part of the hotel. He and I alternately attended to the bar. The money was put in the drawer to the best of my knowledge. Matters that were paid out for the house we paid out from the bar. It did not make any difference who paid it as long as the demand was made. He took charge of the money at night ; he was on night duty. I had charge of the cash-box as soon as I came in the morning. I did not sleep in the house. When I came in in the morning I got the money box, but there might not be a great deal of money in it. When he came down there was always an understanding. We added up our little account to see what was paid out ; there was never much surplus. The omnibus and the horses were paid for from the earnings. This agreement was drawn up between her and me. \* \* I do not very well remember who proposed going into this. I had met Murray before. I understood that he wanted a partner ; he did not tell me that ; a friend of his told me. I came to the place and arranged with Mrs. Murray. I went to her first because I understood she was the one to deal with. I knew Murray by sight at this time but had not any acquaintance with him. I had some conversation

with her, and some with him afterwards. I came to Toronto especially on this business. I did not see him before I saw her. He was at Toronto when I was seeing her. I had not seen him at Toronto. I knew he was there when I came up here. It was in consequence of something I heard in Toronto that I came here. I went back to Toronto after seeing her; I did not see him there. I daresay he came back in the meantime. He telegraphed me to come up after Mrs. Murray and I had made the arrangements. I had nothing at all to do with him before this; he telegraphed me to come and take charge, that he had to leave. I had not seen him before that on the business. In consequence of what some one told me I came here to make a partnership; and I came to an agreement with her. I never saw him in Toronto; I saw him at Owen Sound and talked to him about this matter; that was after it was settled. She accepted the offer. It was before the writing was drawn that I had talked to him. We talked about the business, how it was going to pay the both of us, and how it was going to work. That is the first time I ever had any talk with him about it. I did not know him before this, only by reputation. All the time I was there he conducted the business equally with me. As far as the principal point went I was the person that was conducting the business. \* \* Before I went back to Toronto there was an understanding that I would get some communication from her whether she would accept this plan or not after talking it over with her husband."

Mary Murray, sister of David Murray, was also examined and swore: "I lent Mrs. Murray \$300; that was about two years ago; she came down and wanted it; I do not live here; she came to my home; I brought it up to her afterwards; I got her note for it; it is outstanding yet. \* \* I lent \$300 of my own money with which these Murrys have nothing to do; I hold a note from Mrs. Murray for it."

James McLaughlin was examined and stated: "I have a bakery and confectionery store in town; I know when Mrs. Murray came here; the hotel has dealt with me ever since it was opened; they have got all their bread and their cakes and biscuits, and large portions of cigars from me; outside of the partnership I dealt with and gave credit to Mrs. Murray; everything on the book is charged to Mrs. Murray since there was no partnership."

Cross-examined: "Q. How did you give credit to Mrs. Murray more than any one else? A. Because there was no one else to recommend it; I know it; I know it from her own statements; I have no other source but from her own statements: I got my money paid from the bar; whoever happened to be there paid me; that might be Sproule or Felcher, or it might be her husband or herself; one of these three men most generally paid me; Felcher and Sproule always appeared to take more responsibility than Murray: I mean with reference to my business."

"Q. When they were there the orders were given by either Sproule or Felcher? A. Not specially; Mr. Murray would say: 'You had better wait for Sproule or Felcher.' He would not assume the responsibility himself without Mrs. Murray was there. I would get paid by whoever happened to be in. It was because I understood she was running the Murray part of the business. I did not know anything about his affairs. He was not looked on in the business as having any control in it. That is the light I took upon it. I did not get that information directly from her. I got that information sometimes from one source and sometimes from another. I got it by inquiry. I heard that she was the person that was responsible. I have spoken to her about it. She told me she had to do it for the sake of supporting herself and her family."

Henry Leslie proved the loan by him of \$500 to Mrs. Murray, and that she had repaid it.

The other material facts appear in the judgments.

His Lordship entered a verdict for the plaintiff, reserving leave to move for a nonsuit or verdict for defendant, on the law and evidence.

In the following term a motion was accordingly made in the Queen's Bench, (Hargarty, C. J., and Armour, J., presiding,) for a rule *nisi* in the terms of the leave reserved, which the Court refused; and thereupon the defendant appealed, and the appeal came on to be argued before this Court, on the 7th of September, 1882.\*

*McCarthy*, Q.C., and *Laidlaw* for the appellant.

*Bethune*, Q.C., and *Morrison*, for the respondent.

\**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, J.J.A, and CAMERON, J.

The only ground of appeal was that the business of hotel keeping, carried on by the plaintiff and her husband, was not the separate trade or business of the plaintiff, carried on by her separately from her husband within the meaning of the statute in that behalf, and that the earnings and profits thereof, and the goods purchased therefrom were, in law, the property of the husband, and liable to seizure for his debts. *Irwin v. Maughan*, 26 C. P. 455; *Harrison v. Douglas*, 40 U.C. R. 410; *Meakin v. Samson*, 28 C. P. 355; *LaPorte v. Costick*, 31 L. T. N. S. 434; *Lovell v. Newton*, 4 C. P. D. 7; *Foulds v. Curtelett*, 21 C. P. 368; *Re Gearing*, 4 A. R. 173; *Ashworth v. Outram*, 5 Ch. D. 923; *Lumley v. Timms*, 28 L. T. N. S. 608; *Duncan v. Cashin*, L. R. 10 C. P. 554, were referred to.

March 24th, 1883. SPRAGGE, C. J. O.—This was an interpleader issue, tried before Mr. Justice Morrison and a jury, and the issue was, whether certain chattels seized in execution at the suit of the defendant were the property of the plaintiff or the property of her husband, the execution debtor.

The goods seized consisted of furniture and other things, in a tavern in Owen Sound; and at the close of the plaintiff's case, Mr. Irving, for the defendant, submitted that the business carried on by the plaintiff was not carried on by her separately from her husband, and that the goods in question were liable to seizure for the debts of the husband. No evidence was given on behalf of the defendant; and the learned Judge entered a verdict for the plaintiff, reserving leave to the defendant to move for a nonsuit, or verdict for the defendant, upon the law and evidence. Counsel for the defendant moved accordingly, and the rule *nisi* was refused.

The plaintiff's case rests principally upon her own evidence, corroborated however, in several material particulars by the evidence of Felcher, with whom, as stated in the evidence of both of them, she was for some time in partnership in the hotel business; by the evidence of

Sproule, with whom at a subsequent date she was in partnership in the same business, according to her own evidence, and the evidence, though less distinct, of Sproule also ; and corroborated also by the evidence of other witnesses. The husband's debt to the defendant was contracted before the business of hotel-keeping was entered upon ; whether before the plaintiff's marriage does not distinctly appear.

The plaintiff in her evidence gives a narrative of her life, so far as business is concerned. since her marriage, and to some extent before it : and we must now, I assume, take that narrative to have been credited by the Court and jury ; and the question before us now is, as was the question before the Court in term, whether the facts disclosed in evidence bring the plaintiff's case within the 5th and 7th sections of the Married Woman's Act, R. S. O., ch. 125.

The facts appear to be shortly these. She married in 1870, her husband being at the time a tenant on a farm belonging to his father. At the date of her marriage she had some money, the savings from her occupation as a sempstress, and she had a house and lot of small value. She and her husband lived on the rented farm for about two years, when he was "sold out for debt." What he had did not suffice to pay the arrears due for rent and his debts. It left unpaid the debt for which the defendant now has execution.

At that date the man had literally nothing ; the wife had about \$300, and they had to begin life anew. She thought as she says that she would go to hotel-keeping ; as she had had a little experience of it, and thought she could get along with it. She said to her husband that he was not a success, and she would try it herself ; and would give him \$15 a month, and he could mind the bar. She took what was called the Dixie property as a tavern. She used her own means, and she borrowed money, and made the arrangements ; and it was in this way and under these circumstances that the business of hotel-keeping was com-



menced. I will give in her own language her view of the situation: "I had lost confidence in him (her husband) when I went to Alton, because he had not proved a success to himself; I mean that he was in a good position, and could have been in a good position if he had attended to it. He ran to horse races, and I do not know what he did with his money. He went through lots of it, but I do not know what he did with it. That was when we went on the farm, and before we went on the farm. He proved himself extravagant. I thought him a spendthrift."

The character and habits of the man, his wife's estimate of him, and his non-success in life so far, throw light upon the position of the two at what may be called a crisis in their married life; and are aids to us in forming an opinion, as to whether the arrangement between them was merely colorable or was real—a mere device to fence off, and defeat creditors, or an arrangement really and actually entered into for the carrying on of a business by the wife. It may be that if there had been no creditors, or no debts remaining unpaid after the husband's failure, this arrangement would not have been entered into; but if not it is not decisive of the case, and it is by no means certain that it would not have been entered into if creditors had been out of the case; for she had means and he had none. She had no confidence in him, and she had reason to have confidence in herself.

We cannot say from the position of the parties, or from anything that appears by the evidence, that the arrangement must have been entered into for no other reason than in order to defeat creditors. It may be that it would not have been entered into, if the parties knew, the wife particularly, that the profits of the business, and the increase of the capital put into it by the wife, would, but for some such arrangement, be the property of the husband and seizable by his creditors. It is a proper inference I think that the arrangement was made in the shape in which it was made. in order to place the property put into it and the profits made from it out of the reach of the husband's creditors;



but if this property and its increase, and the profits made belonged to the wife, not to the husband, the effect of the arrangement would be, not to place *his* property out of the reach of *his* creditors, but to keep the property of the wife out of their reach. The parties placed themselves in a position which was a reversal of the old time rule of the relation of husband and wife, and of the effect of that rule upon the personalty of the wife. She became under the arrangement, to use a homely but expressive phrase, the "bread winner" where ordinarily the husband would be so; and her husband became her servant at monthly wages for services rendered by him in her business establishment. That was the footing upon which they professed, and intended to place themselves. The evidence leads to the conclusion that they did so profess and so intend actually and not merely colorably, and the question is whether the law as it now stands enabled them to do this.

It is not necessary to consider whether if the wife had been like the husband, without means, and they had agreed that the business of hotel-keeping should be carried on by her, upon hired premises and furniture, that is, in a ready furnished hotel, he receiving wages; the profits of such a business, and furniture and the like purchased out of such profits, would be within the protection of the statute. This case has the material element, that the wife had personalty of her own, which she was at liberty to deal with as her own; and that she made the use of it that she did, as part of the arrangement, and that the increase of it was from the personalty originally put in by her, and the profits made from its use, and those accruing from the business of the hotel.

Our Married Woman's Acts are in one respect more explicit than the English Acts, containing this, which is not in the English Acts: "And the possession whether actual or constructive of the husband of any personal property of any married woman shall not render the same liable for his debts." This however is the less material because it has been held in several cases in England that

it is not necessary to the carrying on of a separate business by the wife that the husband and wife should not live together in the same house. Still it shews the great care of our Legislature in the protection of the separate earnings of the married woman.

One of the English cases *Laporte v. Costick*, 31 L. T. N. S. 434, has been referred to by both parties to this appeal. The business carried on in that case was that of a boarding house keeper, a business certainly which might very well be carried on by a wife separately from her husband. The Court decided against the claim of the wife upon two grounds. The husband was an invalid and totally unfit to take any part in the lodging house except by conducting correspondence and keeping accounts and delivering orders to tradesmen or others. The County Court Judge, from whose judgment an appeal was taken to the Queen's Bench, found that all that the husband did was as agent, and at the request of his wife. And upon that Lord Blackburn, after observing upon the acts done by the husband some in his own name, some in that of his wife, added that if "he acted only as his wife's agent he would still be a partner in the business and be liable for all the contracts made for it. \* \* She cannot have carried on a trade separately from her husband, when he was acting as her agent in matters necessary for its success." I do not find any report of the case in the regular reports, but at any rate it does not assist the defendant's case, for in the case before us the husband did no such acts as in the case reported seemed to the Court to be acts which divested the business carried on of the character of *separate* business: and there was no agency on the part of the husband in the carrying on of the business. The husband was actually hired and paid as bar-keeper; and that not as a matter of form, but as a matter of fact, just as if the wife had been a *feme sole* and he a stranger; and he discharged the duties of that position just as a stranger would: and this is particularly noticeable during the existence of the partnerships between the wife and third persons; first with Felcher

then with Sproule. The wife, and her business partner for the time being, managed the business and the husband did the work of a bar-keeper and was paid with partnership funds. His employment for a specific service, the purchase of a horse or horses for the hotel omnibus in the time of Sproule's partnership, was no exception. The partners employed one of their servants to make purchase of an article of which he was assumed to be a better judge than they were.

The true distinction I take to be that which was expressed in few words by Lord Coleridge in *Ashworth v. Outram*, 5 Ch. D. 937: "He does not seem to have interfered at all in what may be called the *conduct* of the business." The Court in that case came to the conclusion that the business carried on having been carried on by the wife separately from her husband, "the stock-in-trade which was the means of carrying on this business, and without which the business must have come to an end, and there could be no wages and earnings, is protected."

*Lovell v. Newton*, 4 C. P. D. 7, following and referring to *Ashworth v. Outram*, is a decision in the same direction. Mr. Justice Denman giving as the substance and intention of the Married Women's Act, "to protect the fruits of the talent and industry of married women from being made liable for the debts of their husbands." The case of *Lumley v. Timms*, 28 L. T. N. S. 608, may also be referred to.

In my opinion, certainly, claims of this nature, by a married woman, should be very carefully scrutinized by the Courts, for unless they are so the just claims of creditors may be defeated by covinous or colorable arrangements entered into by debtors. At the same time we are to bear in mind that while the effect of the legislation in respect of the property of married women has been to make a very great change in that branch of the law and, *inter alia*, to place beyond the reach of creditors of the husband much that under the old law was exigible at their suit, it has been the deliberate intention of the Legislatures as well in England as in this country, to make the great change

that has been made, evidenced very clearly by the several Acts that have succeeded one another, placing the property and the personal earnings of married women more and more under their own control; and less under the control and less subject to liability for the debts of their husbands.

Clearly the husband and wife may contract one with the other. Clearly the wife may carry on a business separately from her husband in the same house in which she and her husband live together as man and wife, as was distinctly affirmed in *Lovell v. Newton* after being thrown out as matter of opinion in previous cases. It comes to be a nice question, when the husband has taken any part in a business which is claimed by the wife to have been carried on by her separately from her husband; but as I have said already, I think the true distinction is that taken by Lord Coleridge, whether or not the husband has interfered in the conduct of the business. In this case each seems to have been particularly careful upon that point. The business carried on was of a nature in which this might be done without much difficulty; and the woman may have possessed so much more business capacity, that her proper function was that of manager, while the man was fit only for the post of bar-keeper, and was confined, and confined himself, to the duties of that position. This man and woman trod upon dangerous ground, and probably knew their danger sufficiently well to leave no room for question whether the business carried on was not the separate business of the wife.

Taking the evidence to be true, as from the way in which the case comes before us we must take it to be, we cannot say that the Court below was wrong in refusing to disturb the verdict.

BURTON, J. A.—At the close of the case a nonsuit was moved for, but the learned Judge directed a verdict for the plaintiff, with leave to the defendant to move for a nonsuit, or a verdict in his favour.

We must assume, therefore, that there was no dispute

upon the facts, but that taking them as established, we are called upon to say whether the business carried on by the plaintiff in the manner disclosed upon the evidence was a business employment or trade carried on by her separately from her husband, within the meaning of the Married Woman's Act, or whether on these facts, as between the claimant and the execution creditor, the goods the proceeds of the business must not be taken to be the goods of the husband, and therefore liable to be taken to satisfy his debt.

No question is raised as to those goods which the claimant purchased with her own money upon her marriage, nor those which were adjudged to be her property by the County Court Judge of Peel, on the occasion of a previous seizure. The question therefore is reduced simply to the point I have mentioned, and we have little to help us in the way of adjudged cases.

The cases do shew, as we might have expected, that it is not necessary in order to its being a separate business that the wife should be living apart, or that it should be carried on in a different house from that in which the wife and husband reside; but the reasoning of the Judges in England, under the Married Woman's Act there in force, and not distinguishable in this respect from our own, shew, I think, how strictly in their view the words, "separate business" are to be construed.

Independently of the Married Woman's Act, it is quite clear that a woman might acquire the right to the proceeds or profits of a separate trade by agreement with her husband or by his permission, and that the Court would protect those earnings. If the agreement was made previously to the marriage, it would be binding, not only on the husband himself, but valid as against creditors; but if it originated after marriage it would be void against the creditors, but good against himself.

Such was the case of *Ashworth v. Outram*, 5 Ch. D. 923, apart from the statute. The deceased husband had allowed his wife to carry on a business in her maiden

name, which she had carried on previously to the marriage, without any interference on his part, either with the debts, the creditors, or the management, or anything connected with it, which amounted in fact to a post nuptial settlement, and good, therefore, against the husband's next of kin ; but it is clear, putting the Married Woman's Act for the moment out of view, that it would have been invalid as against creditors.

This being the state of the law prior to the passing of the Married Woman's Acts, those Acts enable her without any such agreement or permission on the part of the husband to enjoy the profits or proceeds of any such separate business without any interference on the part of the husband or of his creditors, but it must be her separate business carried on by herself separately from her husband. Is this such a business ?

The Vice-Chancellor points out in the case I have quoted the object of the Act, and the hardship intended to be guarded against. It was found, he says, that there was a great number of cases of familiar occurrence where a woman is carrying on a trade. A familiar instance is that of a dress-maker or a milliner, or where she is carrying on an artistic occupation, such as a singer, or an actress, or a sculptor, or any of those things in which women may be skilled, and may earn great sums of money. It was thought a very hard thing, that whatever a married woman earned by a business of this kind should immediately become, according to the settled principle of the common law, the absolute property of the husband, and to remove this hardship the Act was passed ; but I gather from the language of Lord Coleridge in that case, that what occurred here would have been regarded as such an interference in the conduct of the business as to deprive it of its separate character, and it is fitting that it should be so ; the Act would be constantly evaded and made a shield for frauds upon creditors, if transactions of this nature were held to come within it ; if the husband could be engaged to manage one department, why could not the entire business be conducted in her name by means of his agency ?

I do not think that under this Act it was intended that there should be any inquiry as to the *bona fides* of the transaction; it must have been present to the mind of the Legislature how easily frauds might be committed if the husband were allowed to take an active part in the business, and the very terms used in the Act are to my mind convincing that all such inquiries were intended to be excluded, and that any interference by the husband in the conduct of the business with the wife's concurrence deprived it at once of its separate character.

I am of opinion, therefore, that the wife has failed to bring herself within the protection of the Act, and that this appeal should consequently be allowed, with costs. Our judgment, therefore, reversing the judgment of the Court of Queen's Bench, should be that the verdict be entered for the defendant on the leave reserved.

PATTERSON, J. A.—The only question for decision is whether a business carried on as the business of the plaintiff is shewn to have been carried on, can be said to be an occupation or trade carried on by a married woman separately from her husband, within the provisions of the seventh section of R. S. O. ch. 125, so as to enable her to hold the proceeds and profits free from the debts of her husband.

The plaintiff Elizabeth Murray is the wife of David Murray. They were married in 1870. After the marriage David worked a farm as tenant of his father, but got into debt and was sold out. During this period the debt to the defendant was contracted. Then the husband and wife lived for a while at Alton, then at Teeswater, afterwards at Holstein, and ultimately at Owen Sound. Their support at each of these places was derived from keeping tavern. The plaintiff asserts that in each case the business was hers, and that her husband, who always, except during a temporary absence at Red River for five months of the Teeswater period, was actively engaged in connection with the business, as I shall more particularly point

out, acted merely as her servant, or the servant of her firm when she had a partner, at monthly or daily wages.

The idea of keeping tavern originated, as the plaintiff says, with herself, and was adopted as a means of earning a livelihood, being a business with which she had some acquaintance. She had a small sum of money the remnant of her savings before her marriage. It is not very important that we should know how much she had ; but taking the amounts given by her in her preliminary examination and in her evidence at the trial, I gather that, after paying for her marriage outfit, she had \$150, which she invested in a lot in Alton and in the purchase of some lambs. The Alton lot and the lambs, which had become sheep, were sold, and when the first tavern was opened, which was at Alton, were represented by \$100, worth of furniture, and \$50 cash. This, as I understand the effect of the several statements made by the plaintiff, comprised all the capital of her own with which she started. She borrowed \$150 from a Mr. Fallis, giving her promissory note which was paid out of the business ; and with this amount of \$300 in money or money's worth the business was begun.

Some of the articles seized by the sheriff are said to be portions of this furniture. They cannot be identified from the evidence before us ; but if, in the result, the plaintiff fails to maintain her right to the rest of the goods, there can be an inquiry if necessary as to these, for of course they are not liable to seizure under the defendant's execution. They are, as I understand, the same goods which the defendant disclaimed by notice dated 11th April, 1881. That notice was after the issue had been delivered ; but it will serve to protect the defendant from costs if the plaintiff only succeeds in respect of those goods.

There can be no doubt that, throughout the whole tavern keeping business, some care was taken to deal on the footing of the business and property belonging to the wife, and the husband being merely her servant or agent. That the object in this was to protect the earnings from the creditors of the husband is candidly avowed ; and we



have to take the fact to be found by the verdict at the trial and affirmed by the refusal of the rule by the Court of Queen's Bench, that, as between the husband and wife, the understanding was that the business and all acquisitions therefrom belonged to the wife. We have only to deal with the legal question raised by the creditor, who claims a right to be paid out of what he asserts to be the earnings of his debtor—was the business an occupation or trade carried on by the wife separately from her husband? I cannot see my way to any other conclusion than that it was not so carried on. That is what strikes me as the only conclusion which can properly be drawn from the facts; and I think it is in accordance with the construction put upon the analogous provisions of the Imperial Statutes in all the English decisions on the point.

The inquiry seems to me to resolve itself into the question whether the separation contemplated in the seventh section of the statute means an actual *de facto* prosecution of the occupation or trade by the wife alone; or whether the statute is satisfied by such an agreement between the parties as would amount to a post nuptial settlement upon the wife of all the earnings of a business which may owe its success to the active exertions of the husband, or which may, at least, have been so conducted by him as to make it impossible to say that it has been in fact carried on separately from him.

That this is the character of the business now in question is, I think, perfectly apparent from some extracts which I shall read from the printed evidence. I may repeat that I am not questioning the reality of the agreement between the husband and wife, that the business and every thing connected with it should belong to the wife, and therefore I do not quote any of the evidence addressed to that topic, but confine myself to that which shews the extent and nature of the husband's interference. I read first from the examination of the plaintiff:

“My husband did not buy the liquors when I was in a position to appear; when I was not he used to order them

through my instructions; I mostly gave the orders; I would not always know what was wanted, and he would tell me; we did not keep any books then; we only kept one man and he hired him for me; we held our own; I mean I held my own; then from Alton we went to Teeswater; started hotel-keeping there; rented a place from a man named Gibson; the boys on the road persuaded me to go there; I sent Murray up to see the place because I was not able to go myself; he was not satisfied with it; he came back and I sent him up a second time; he concluded the bargain when he went up the second time; there was no lease; he made the arrangements by the year, for three years if I was satisfied with it; but I was not satisfied with it when I went up. \* \* My husband managed the business at Teeswater after he came back from Red River; did not have an hostler there; had no help except girls; bought in liquors principally from Ramsay and Hoiland, sometimes through travellers, and sometimes wrote; I generally remitted the money; I sometimes gave a note or draft; sometimes I did the correspondence and sometimes he did; the notes were always signed by me, never by my husband; when I was in the bar, would know what liquors to buy, and when I was not he would tell me; I used generally to pay for my groceries when I got them; sometimes I got them, sometimes my servants, sometimes my boarders, and sometimes Mr. Murray; they would pay for them when they got them; did not deal any place in particular; I generally got the money at Teeswater; it was generally paid to whoever was behind the bar; my husband was bar-tender. \* \* I carried on business of hotel-keeping in Holstein; I bought a place from a man named Spence or Spencer; can't say where he lives now, he was living in the house when I bought it; we learned about Holstein through travellers; Mr. Murray went up to see it; he did not buy it then; I bought it afterwards. \* \* I went on and took possession of the property; my husband was with me; I carried on the hotel-keeping; he was bar-tender; I was to give him \$15 a month; if he could do any better any other place he was welcome to go; there was no written agreement; there were about 50 or 100 inhabitants in the place; did not hire an hostler; I generally bought the liquors; he would write for them through my instructions; I would sometimes order them myself; he did the principal part of the writing; I can't say whether I ever wrote for liquor while we were there;

I bought some from Ramsay and Holland, and, I think, Fitch; when sending money he would write the letter, and I would either give him the money to put in the letter or put it in myself; all the letters were written in my name: the reason I did not write the letters was because he is a better penman than I am; I could have carried on the business without him if I could have got some person else, but while he was there and I was paying him he could do better than I could do myself; if I had had another person in his place I could have carried on without him. \* \* The reason I left Holstein is because I thought I could better myself; Mr. Speers telegraphed to Mr. Murray to get me to come up; Mr. Murray came up; I had been acquainted with Mr. Speers before this; Mr. Murray and Felcher did not make the arrangement when he came up first; he liked the place; Mr. Felcher saw me at Holstein; he did not come with my husband; we came to terms at Holstein; Felcher made the arrangement with me; my husband was present; he said I could suit myself. \* \* My chattels were valued at \$890, but we called it \$800; Mr. Felcher and I valued them and I valued them and Mr. Murray wrote the values down; this was put in as my share; Felcher put in \$800. \* \* We came to Owen Sound on the 10th January, 1878; I understood Felcher gave instructions to have documents drawn; I don't think I gave any instructions; I told Mr. Murray that he had better look after them; I knew nothing of Mr. Felcher and less about Mr. D. A. Creasor. \* \* Mr. Murray did not work long under the agreement of his work being set off against the children's board; soon after we came here a new agreement was made by which Mr. Murray was to get \$25 a month; this was before the agreement dated 1st July, 1878; this was about end of January or beginning of February; Mr. Murray was to look after my interest in the house, attend to things that came in because I was not able to do so, I was sick. \* \* Sometimes I attended the outside business; Felcher attended to the hiring of the men when he was there; Felcher took the money out of the till and took it up to his room, and if Mr. Murray opened out first in the morning he would get it from Felcher and bring it down; so far as the till was concerned Murray had as much to do with it as Felcher. \* \* When I bought out Felcher I gave Mr. Murray charge of the bar and to act as general manager, and I took the house; there was an agreement drawn up between us by

which he was to get \$25 per month ; this is the first agreement in writing that was between us ; I carried on business in this way till I went into partnership with Mr. Sproule in January, 1880 ; the arrangement by which Mr. Murray was to get \$25 a month was continued as before ; he closed bar at night, Sproule opened in the morning ; Mr. Sproule bought liquors, sometimes Mr. Murray, and sometimes myself. \* \* The horses and 'bus were bought in Sproule's time ; Mr. Sproule and I thought it best for Mr Murray to go and buy the 'bus ; it was bought in Port Elgin ; Sproule and myself gave the money to Mr. Murray to buy it ; can't say just now who it was bought from ; I can't say positively that Mr. Sproule handed him the money or that I did, but he was authorized to get it ; if he thought it would suit the firm he was to bring it with him ; it was Sproule's wish that we should have a 'bus ; the horses were bought in town ; I can't say whether it was Mr. Sproule or Mr. Murray who bought the horses ; it was on Mr. Murray's judgment."

The plaintiff's evidence given at the hearing is, for the most part, a repetition of what she said upon her previous examination. I shall therefore read only a few passages from it :

" Q. If you, at Alton, had gone to get a paper drawn up between you and your husband, in what way would it have differed from this, except the \$15 in place of \$25, and Alton instead of Owen Sound ? A. Well, I do not know, I think I allowed him a little more control in this paper than I did when I set out at Alton ; and more control here than at Teeswater ; and I think more control than I allowed him at Holstein, because I was not able to manage the business so well here as there. The business was small there, and I could be always there pretty much, but here I cannot. I had lost confidence in him when I went to Alton, because he had not proved a success to himself ; I mean that he was in a good position, and could have been in a good position if he had attended to it. He ran to horse races, and I do not know what he did with his money. He went through lots of it, but I do not know what he did with it. That was when we went on the farm, and before we went on the farm. He proved himself extravagant. I thought him a spend-thrift. He does not run around so much now. I gave him a little more control when we came here, than he had at Holstein. When I

gave this document I allowed him a little more control. I came to Owen Sound about the middle of January, 1878. All the time he has been in Owen Sound he has had the same control as when I gave him this paper. He works harder now than he did at those other places. He does not manage all the business of the hotel that any man would manage; he does not handle the money for one thing. He does not give any notes now, and never did. He does not do anything more than a hired man. Sometimes he does the marketing. I keep an hostler; he generally hires the hostler; he dismisses him sometimes; sometimes I dismiss him myself. He buys the horses—at least he did. I set up an omnibus. I believe he bought the horses; he bought the omnibus. The horses were got at Owen Sound. The omnibus was got at Port Elgin. He went there and made the selection, and bought it there and drove it over. Sometimes he buys the hay for the horses, and sometimes I do. The hostler sometimes buys the oats."

I pass on to the evidence of Mr. Felcher, who was the plaintiff's partner at Owen Sound:

"There was no partnership in existence until July or somewhere along that time. During these six months the business was carried on in a kind of a go-as-you-please way. It was in January that I went down and bought the furniture. I do not know whether it was after the writings were drawn up between Mrs. Murray and myself, or whether it was immediately on our commencing business. Mr. Murray produced an article, I do not remember exactly how it read, but I can give you an idea of how it was. It read something like this: We the undersigned, Mrs. Murray and Felcher agree to hire David Murray for the sum of 50 cents a day, and board of him and his children, and he was to be in every respect his own boss. Well I did not approve of signing that. I said, 'if you are going to work here under a salary, why certainly you cannot be your own boss, you have to be subject to my orders.' Consequently I did not sign that. I do not remember whether that was when we first started or afterwards. For the first six months there was no written agreement, but we just put our two stocks together. I was principal landlord in one sense of the word. I attended to the business principally, with the exception of the domestic department. Murray was there subject to

my orders; he acted as bartender and man in general. There was an hostler kept; Murray was not the hostler. I would go behind the bar sometimes; there was a cash box and till. I would receive the money, and he would receive the money. I generally attended to closing up the house, and I would take the money to my room. He had a key to my room, and he would get up in the morning and come and get it. I did not assent to his being allowed to command wages and being his own boss. I had no differences with him. During the time he was there we worked harmoniously. When he was on duty he had the same authority that I had, from the fact that that was what he was there for. His wife had the same authority that I had. He and she were not joined for their half. He had no right to dictate to me. She confined herself to the domestic part of the work. He and I attended to the visitors and the bar. As far as an outside person could see he appeared to have as much to do with it as me."

The evidence of Sproule, the subsequent partner, is to the same effect. He speaks of the purchase of the omnibus and horses in the same way as the plaintiff, and describes the general conduct of the business in these terms :

"My work there was to do the general work of a hotel. I carried on the business as a partner; Murray was acting too, just in the same capacity. He and I did all the hotel-keeper part of the business. We were the managers and bosses. She had her duty to perform; it was superintending the domestic part of the hotel. He and I alternately attended to the bar. The money was put in the drawer to the best of my knowledge. Matters that were paid out for the house we paid out from the bar. It did not make any difference who paid it as long as the demand was made. He took charge of the money at night; he was on night duty. I had charge of the cash-box as soon as I came in in the morning. I did not sleep in the house. When I came in in the morning I got the money box, but there might not be a great deal of money in it. When he came down stairs there was always an understanding. We added up our little account to see what was paid out; there was never much surplus. The omnibus and the horses were paid for from the earnings."

I confess myself unable to conceive a clearer case of

interference by the husband in the conduct of the wife's business than that which is shewn by this evidence. At no time, except during his temporary absence, was the business conducted without that part of it which was probably the most essential to its success being actively managed by the husband. This is very noticeable during the two periods when the partnerships existed, because the two partners describe the part taken by the husband as being as nearly as possible the same as that which they themselves took in the conduct of the business.

He had no other occupation or means of support, and contributed in no other way to the support of his family.

I place no weight on the circumstance that he was paid wages and that there was a very formal bargain about them. That would, no doubt, be a very significant bit of evidence in favor of the wife, if she and her husband were contesting the ownership of the property, and it might go a long way in the direction of establishing a settlement upon her of the property which was the produce of their joint exertions; but it does not appear to me to touch the question of the separate carrying on of the business, unless, perhaps, by disproving it. The hiring of a man, whether husband or stranger, to work at a particular undertaking, or any agreement between two persons that each shall manage one department, as *e. g.*, one of them the domestic concerns of a hotel, and the other the bar and stable, whether one of them is to be paid by a share of the profits, as such, or by a monthly stipend, cannot shew that one is to carry on the business separately from the other, unless the separation refers only to the interest of the parties in that at which they work jointly and not separately. The reasoning which asserts the contrary would have equal force where the wife never personally interferes, but leaves the whole business, and not merely a department of it, to be conducted by her husband as her agent.

The Imperial Statute, 33 & 34 Vict. ch. 93, sec. 1, resembles in its provisions the 7th section of R. S. O. ch. 125, so nearly as to make decisions under it authorities



upon the construction of our statute. It provides that "the wages and earnings of any married woman acquired or gained by her in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property." Our sec. 7 describes the subject matter as "all the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds and profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic, or scientific skill." So far the description is substantially the same as in the Imperial Act, although the language of the latter has not been closely adhered to. It then continues in language copied from the Imperial Act, "and all investments of *such* wages earnings, *moneys*, or *property*," the draftsman forgetting for the moment that he had dropped the words "money and property" in framing the previous description. Then the enacting portions of the clauses are equivalent in effect though differing in expression. Our section declares that the wages, &c., shall be "free from the debts or dispositions of her husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a *feme sole*; and no order for protection shall hereafter be necessary in respect of any of such earnings or acquisitions; and the possession whether actual or constructive of the husband, of any personal property of any married woman, shall not render the same liable for his debts."

I do not understand this enactment to give to the married woman any greater rights than she enjoys in England under the Imperial Act. The concluding words



have been referred to in argument as indicating some qualification of the separation mentioned in the earlier part of the clause, by implying permission to the husband to take part in the occupation or trade of the wife while it is still deemed to be carried on separately from him. I do not so read the words. I am not prepared to say what their effect may be, or that they have any effect, or are not inserted merely *ex majore cautela*. I do not suppose it can be contended that, granted the wife's ownership of any piece of personal property, this express provision was necessary to preserve her ownership, notwithstanding that the husband had possession of it, either using it for himself or managing it for his wife. But with whatever motive the provision was inserted, it has no relation to the matter now in discussion. The personal property must be proved to be the wife's before this provision touches it.

A stronger argument, but upon the other side, might be based on the reference to the order for protection, if we could legitimately reason from these later expressions as to the proper extent or force of the earlier ones. The argument would be that the object of the clause was only to enable the married woman to enjoy without an order for protection the same earnings and acquisitions for which she would formerly have required an order; and these clearly would not have included those at present in question. It is, I think, manifest that we must interpret the words which directly touch the present case by their own force, without modification from the other expressions; and that the enactment, so far as we have now to do with it, is essentially the same as that of the Imperial Act. In my opinion, what would under that Act be a separate carrying on of business will be the same under ours, and *e converso*. I see nothing in the departure in our Act from the language of the other to give the married woman larger rights, and on the other hand, I do not read our Act as intended to give any narrower rights, though perhaps the expression "*personal earnings*" is calculated to emphasize the entire

dissociation of the husband from the pursuits from which the protected earnings are derived.

We have been referred to three English cases, viz; *Laporte v. Costick*, 31 L. T. N. S. 434, which was decided by the Court of Queen's Bench in 1874; *Ashworth v. Outram*, 5 Ch. D. 923, decided in 1877, by Sir R. Malins, V.C., whose judgment was affirmed by the Court of Appeal; and *Lovell v. Newton*, 4 C. P. D. 7, a decision of Denman and Lindley, JJ., in 1878.

In *Laporte v. Costick*, the husband had rented a house in his own name, for the purpose of his wife letting lodgings therein. She directed repairs to be made, which the builder charged to her husband. The husband's name was on the rate-book and registers; he lived in the house, wrote his wife's correspondence, kept her accounts, and gave orders to tradesmen for her; he was, however, totally unfit from ill health to take any part in the management of the house. The furniture which had been seized on an execution against the husband for groceries supplied, had been purchased by the wife with earnings acquired by her from these lodgings, since the passing of the Married Woman's Property Act, 1870. The County Court Judge, from whose decision the plaintiff appealed, found as a fact that the husband acted throughout merely as his wife's agent in conducting her business. I take this statement of facts from the head note. In deciding against the plaintiff, some stress was laid upon the fact that the husband by his conduct made himself liable for debts; and to that extent the decision proceeded upon facts which may not exist in the case before us, and so the cases may not be on all fours. But I may read the judgment of Lush, J., for the statement which it contains of the principle on which the Act should be construed: "It is incumbent upon a married woman who claims protection under this section to shew that she has carried on business separately from her husband. He need not necessarily be living apart from her; but the facts of this case are too strong to hold these goods to be the claimant's. They

entirely negative the finding that the business was separate. The mere assertion that a husband acted as his wife's agent, if it were enough to protect his property from creditors, would be a very easy means of evading the evident intention of the Act. In my opinion there is here no evidence upon which the County Court Judge could properly conclude as he has done."

*Ashworth v. Outram*, was not a case in which creditors claimed against the wife. It was a contest between the wife and the personal representatives of her husband, and was decided by the Vice-Chancellor without further reference to the Married Woman's Property Act, than as tending to confirm the opinion which he had formed in favour of the wife independently of the Act. He quotes from *Roper* on Husband and Wife, and continues thus, (p. 933): "Therefore, the rule is, that if a husband permits a wife after marriage to carry on a business for her own separate use and benefit, that becomes her separate property, which as between him and her—not between his creditors, but between him and her—is binding and makes the property her own separate estate."

I understand the judgments delivered in the Court of Appeal to have proceeded upon the same views, except that of Baggallay, L.J., who doubted if the case of the wife could be supported under any of the clauses of the Act, or under any combination of those clauses, but based his judgment on the ground that the husband had constituted himself, even on the general recognized principle of equity, trustee for his wife. The case can scarcely be regarded as an authority to guide the decision of the present case. If it has any bearing upon it, I think it is against the claim of the wife, because the facts, as they are summed up by Lord Coleridge, on which the wife would have had to rely in a contest with a creditor of her husband, differ from those before us in the essential circumstance that there the husband did not interfere in the conduct of the business, while here he was throughout actively engaged in it.

Lord Coleridge's language is thus reported: "According

to the evidence, he scarcely interfered at all with the business, not more than we should naturally expect a person to do who lived in the same house and was the husband of the person who was carrying it on. He does not seem to have interfered at all in what may be called the conduct of the business ; it had theretofore been carried on in the maiden name of the married woman, it continued to be so carried on," &c.

In *Lovell v. Newton*, the husband, a butcher, became, in consequence of confirmed intemperance, incapable of continuing his business, and it was carried on by the wife, for the support of the family, with money lent to her by her friends. Some meat, which was seized upon an execution against the husband, was held to be the property of the wife. The judgment proceeded upon the ground that the husband, though sometimes living in the house, never interfered with the business. Denman, J., observing that the only *law* decided by the judgment was, that the mere fact of the husband living in the house at the time the business was being carried on by the wife, did not deprive the wife of the protection afforded by the Act.

Reading these decisions and the reasons given by the learned Judges who took part in them, I cannot suppose that a business carried on like that now in question would be considered by those Judges to be carried on by the wife separately from her husband. On the contrary, I regard all three cases as authorities supporting the construction which I have given to the statute.

I may say the same thing of the decisions of our own Courts of Queen's Bench and Common Pleas, in *Harrison v. Douglas*, 40 U. C. R. 410 ; and *Meakin v. Samson*, 28 C. P. 355, which proceed upon the same reading of the statute, although only one of the three English cases I have mentioned, viz., *Laporte v. Costick*, had been decided or reported when the judgments were delivered.

I think we should allow the appeal, with costs, and enter a verdict for the defendant, pursuant to the leave reserved, with costs in the Court below to the defendant.

CAMERON, J.—I concur in the opinion of the learned Chief Justice of Ontario, that the appeal in this case should be dismissed, and for the reason he has assigned. I will only add that in my judgment the only kind of occupation or trade *bond fide* carried on by a married woman that would disentitle her to the protection afforded by sec, 7 of ch. 125 R. S. O., is an occupation or trade in which her husband has some legal or equitable interest or right of interference as between her and him. The authorities shew that it is not essential that the husband should live apart from the wife to make her occupation or trade a separate occupation or trade, or, in other words, one carried on separately from her husband. No intelligible construction can be given to the provisions of the said section that does not concede this. If the husband lives in the house with the wife where she carries on business, she does not in one sense carry on an occupation or trade separate from him. But if he has no interest in the occupation or trade it is separate from him in a legal sense. Let us assume that a married woman is carrying on the business of a money lender, there being no question that the money she lends is her own, but when she receives money she sends her husband to deposit it in the bank, or to draw it out and bring it to her when she wishes to lend it in her business, could it be with any degree of reason contended that such employment made the money itself or the interest earned the money of the husband and liable to his creditors for his debts? If it could what becomes of section five of the Act, which declares every woman who has married since the 4th day of May, 1859, or who marries after the passing of the Act without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold, and enjoy all her personal property, whether belonging to her before marriage or acquired by her by inheritance, bequest or gift, or as next of kin to an intestate or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition without

her consent in as full and ample a manner as if she continued sole and unmarried. This provision clearly would prevent moneys invested in the way I have indicated from being subject to the husband's control or liable for his debts unless the money was received from the husband during the coverture, and the clause, read with clause 7, indicates a clear intention on the part of the Legislature to give to a married woman in respect of her property and her earnings as absolute a right of disposition and management as if she were sole and unmarried. In my opinion the employment by her of her husband in any occupation or trade she may carry on will not make her property or the proceeds of such occupation or trade her husband's or liable for his debts. And unless it appears by the evidence in the case that the husband has a legal interest in or right of interference with the business without her consent, as matter of law, such property or the proceeds of such occupation or trade cannot be held to be the husband's or be made liable for his debts. It must thus be a question of fact in every case. Is the occupation or trade of the wife carried on by her separately from her husband?

The English authorities, as I understand them, do not array themselves in opposition to this view. The case of *Laporte v. Costick*, 31 L. T. N. S. 434, which is the most direct authority against the plaintiff in this case, is very readily distinguishable, and upon the facts was rightly decided. The wife was not acting independently of the husband, but apparently for the husband; she was his agent or servant, and not he hers. The finding that he was her agent by the County Court Judge, might very well be, as it was, overruled upon the evidence in the case; and the language of Lush, J., in overruling his judgment, strengthens the view I have expressed rather than militates against it. It is as follows: "It is incumbent upon a married woman who claims protection under this section to shew that she has carried on business separately from her husband. He need not necessarily be

living apart from her ; but the facts of this case are too strong to hold these goods to be the claimant's. They entirely negative the finding that the business was separate. The mere assertion that a husband acted as his wife's agent, if it were enough to protect his property from creditors, would be a very easy means of evading the evident intention of the Act. In my opinion there is here no evidence upon which the County Court Judge could properly conclude as he has done." The business carried on was that of a boarding house. The husband rented the house in his own name for the purpose of the wife letting lodgings therein. She directed repairs to be made, which were charged to her husband. His name was on the rate book and register. He lived in the house, wrote his wife's correspondence, kept her accounts and gave orders to tradesmen for her ; but he was, from ill-health, unfit to take any part in the management of the house. The furniture which had been seized in execution against the husband for groceries supplied, had been purchased by the wife with earnings obtained from the lodgings. The language of the learned Judge applied to these facts cannot, I think, be said to decide that the wife may not under any circumstances employ the husband in connection with her business, without rendering her property acquired from such business liable to his debts. It must always resolve itself into the question, is it in truth the wife's business, or is the use of her name but a cloak to protect the husband's property from his creditors. It is not necessary to consider in the present case what would be the effect if the position of the husband and wife were reversed, and she was employed by him, upon the liability of property acquired by her with wages paid by him to satisfy his debts.

*The Court being equally divided the judgment of the Court below was affirmed, and the appeal was dismissed, with costs.*

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## IN RE MCDOUGALL.

*Insolvent Act—Interest on claims—Practice.*

After payment by an insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee.

*Held*, [reversing the decision of the Court below] that notwithstanding the provisions of sec. 99 of the Insolvent Act, interest was payable on all debts originally bearing interest by contract or otherwise, but not where it was claimable by law as damages only.

*Held*, also, that the claim to such interest was properly brought before the Court by petition filed by the inspectors, who, acting under a resolution of creditors, had requested the assignee to pay such interest.

THIS was a petition presented to Deacon, Co. J., of the County Court of the county of Carleton, sitting in insolvency, under section 125 of the Act of 1875, by Charles G. Morgan, William Murray, and George Burn, inspectors of the joint estate of John Lorn McDougall and Duncan Campbell McDougall, insolvents, setting forth that in October, 1877, the insolvents having become unable to meet their engagements duly assigned all their estate and effects to an official assignee: that subsequently, at a meeting of their creditors, held at Renfrew on the 10th November, 1877, Andrew Wilson Bell was duly elected creditors' assignee to their estate, and thenceforth became the duly appointed assignee thereof, to whom the official assignee duly transferred the same by deed: that Bell continued assignee, as also assignee of the respective separate estates of the insolvents: that Duncan McIntyre, John McAndrew, and Robert Burns, were the duly appointed inspectors of the separate estate of the insolvent John Lorn McDougall: that no inspector of the separate estate of the insolvent Duncan Campbell McDougall had been appointed; that he had no separate creditors, and had duly obtained his discharge in insolvency.

The petition further alleged that Bell, as such assignee, had disposed of the assets of the joint estate of the insolvents, and had received a large portion of the moneys realized therefrom; that on the 30th December, 1881, Bell,



as such assignee, declared a dividend in favour of the joint creditors for a sum equal to 100 cents in the dollar as the amount of the respective claims of the joint creditors without adding any interest thereto from the date of the insolvency to the date of payment of such dividend: that after paying such dividend a sum of over \$20,000, portion of the joint estate, remained in the hands of the assignee ready and available for distribution amongst the joint creditors, and that such sum was more than sufficient to pay in full all the claims of such joint creditors, with interest thereon to the date of the payment after deducting the sums already paid to them; that on the 3rd January, 1882, at a meeting of the joint creditors a resolution was passed by them directing the assignee to declare a further and final dividend out of such moneys in his hands belonging to the joint estate in favour of such joint creditors, and that on the 8th March, 1882, the petitioners gave the assignee a written direction to declare such further and final dividend in favour of the joint creditors, and to wind up the joint estate: that the petitioners had frequently requested the assignee to declare such further dividend in favour of the joint creditors, out of such moneys in his hands, and to compute said dividend so as to pay to each of the said joint creditors having a claim based on indebtedness usually carrying interest a sum which, when added to the dividend already paid, would equal the amount of such claim as proved against the said estate and interest thereon from the date of the insolvency to the date of payment; that the assignee had neglected and refused to declare such dividend, on the ground that he was uncertain whether the joint creditors were, under the circumstances, entitled to have any interest computed on the amount of their respective claims; that after the payment of such interest on all the claims of the joint creditors there would be a large surplus of money belonging to the joint estate in the hands of the assignee to be transferred to the credit of the respective separate estates. And the petitioners submitted that Bell, as such assignee of the joint estate,

should be ordered to declare such further dividend out of the moneys in his hands, and should be ordered to compute the same, and prayed for an order accordingly, and that the assignee might be ordered to pay the costs of the application.

It appeared that both the insolvents had obtained their final orders of discharge prior to the declaration of any dividend.

After hearing counsel for all parties, the learned Judge dismissed the application, without costs, except those of the assignee, whose costs were ordered to be paid out of the estate, assigning as grounds for refusing the prayer of the petition :

(1.) That the inspectors as such had no duty to perform nor right to present the petition for obtaining for the creditors any amendment of their proof or collocation of their claims.

(2.) That the assignee, as such, could not properly act upon an order such as petitioned for, as it rested with the creditors themselves to present their proofs and obtain the collocation of their claims on their own motion, and upon evidence to be furnished by themselves, or by such agents as could lawfully act for them.

(3.) That neither the inspectors nor the assignee could in any way act as such agents for the creditors.

(4.) That under the law the creditors were not, nor was any of them, entitled to claim any interest on their debts accruing subsequently to the date of the insolvency.

The petitioners thereupon appealed to this Court, and the appeal came on to be argued on the 26th of January, 1883.\*

*Gormully*, for the appeal.

*Bethune*, Q. C., contra.

*Deacon v. Driffl*, 4 A. R. 335 ; *Ex. p. Mills*, 2 Ves. Jr. 295 ; *Re Langstaffe*, 2 Gr. 165 ; *Loundes v. Collens*, 17 Ves.

\**Present*.—SPRAGGE, C. J., HAGARTY, C.J., BURTON and PATTERSON, JJ.A.

27 ; *Ex. p. Champion*, 3 Br. C. C. 436 ; *Lindley on Partnership*, 3rd Ed. 1223 ; C. S. C. ch. 58 sec. 8 ; C. S. U. C. ch. 43 secs. 1, 2, 3, were referred to.

March 24, 1883.—BURTON, J.A.—The question raised upon this appeal is, whether, when an insolvent's estate has paid 100 cents in the \$ upon the claims proved leaving in the hands of the assignee a surplus sufficient to pay interest also upon such claims, he is entitled to pay that surplus to the insolvent, or whether he is bound to divide it among creditors towards the satisfaction of the interest which would have accrued to them but for the insolvency.

The English Act makes express provision for such a contingency. Our Act is silent, the only clause bearing upon it being section 99, which merely provides that if any balance remains of the estate of the insolvent after payment in full of all debts due by the insolvent, such balance shall be paid over to the insolvent. The question is really what is meant by the words "after payment in full of all debts due by the insolvent?"

An attachment in insolvency has been somewhere described as a statutory execution in favor of all creditors. Under it all the property of the insolvent becomes vested in the assignee for the payment of the debts ; but the insolvent law is entirely an innovation on the common law, which left the creditors at liberty to recover judgment and enforce execution, so long as any portion of the debt remained unpaid, whereas the insolvent having delivered over his property, even though it may prove insufficient to satisfy the debts in full, becomes entitled to his discharge, unless he has offended against some of the provisions of the Act with respect to frauds and fraudulent preferences.

There would seem good reason therefore for holding, as a matter of equity and fair dealing, that interest should be payable upon all claims proved in the event of there being a surplus. But even in the case of a judgment at common law interest was not payable ; the right to add it to the judgment and enforce it by execution, depends upon

statutory enactment. In our insolvent law no provision is made for interest in the event which has happened here, probably from the circumstance that the contingency of a surplus is usually so remote that it was deemed unnecessary to legislate about it.

It was the same under the earlier English Bankruptcy Acts, but in the more recent Acts provision is expressly made.

It is necessary under any system of bankruptcy or insolvency, where there is not sufficient to pay all the debts in full to fix some date up to which interest is to be added or rebated ; it matters little what particular date is fixed, provided that the relative value of each claim is fixed as of a given day in order to furnish a basis for an equal distribution.

That has been attained under our law by providing that all debts due at the time of the making of the assignment or the issuing of the attachment, and all debts then existing but not payable until a future day, are allowed to be proved, but this latter class of debts is subject to a qualification requiring a rebate of interest, the effect of which is to subdivide this class again into debts bearing interest and those not bearing interest.

If interest in either case is payable as part of the contract the creditor proves for it as part of the debt, computed up to the date of the insolvency.

In practice I have little doubt that interest is sometimes added when in point of fact it is claimable only as damages which a jury might or might not allow ; but I apprehend it to be clear that such a claim is not provable under our statute, which only provides for the proof of *debts* payable by the insolvent. Where the contract provides expressly for the payment of interest it is as much a debt as the principal money ; but it is otherwise where interest is claimable only as damages.

If the words of section 99 had been after payment in full of the debts so proved, I should have been inclined to think that the surplus fund would not be applicable to the

payment of interest, but the language employed is, "after the payment in full of all debts due by the insolvent." Interest, though stopped for the purpose of equality among the creditors in the distribution of the assets, is part of the debt in all contracts bearing interest as much as the principal: the subsequent interest, though not provable, is still accruing. In the other claims even though a large sum in the nature of damages may have accrued due as interest such damages would not be provable, and there would seem to be no greater reason why, in the absence of express legislative provision, those damages should be payable from a surplus, than that they should be provable in the first instance.

The insolvent has no equity to demand a retransfer of the surplus as regards those creditors whose claims expressly carry interest, because that is part of the debt, and until that debt is paid in full the right to enforce a retransfer of the estate does not arise.

I have read a number of decisions in the United States in which a different rule has been applied, and whilst fully agreeing with the view expressed in some of those cases, that the allowance of interest upon the claims proved from the date of the insolvency until actual payment is equitable and right, and commends itself strongly to one's sense of justice, I have been unable to convince myself that the Courts in so deciding have not usurped the functions of the Legislature.

Under the English Bankruptcy Acts before the 6 Geo. IV. ch. 16, under wording not materially different from that employed in our statute, it was held that where there was a surplus, and interest could not be given at law, but in the shape of damages, it was not the course of the Court in bankruptcy to give interest.

The rule is well expressed in a note to *Ex parte Champion*, to be found in 3 Brown's C. C. 436, where it is said: "The Lord Chancellor acknowledged the rule to be as laid down by the Solicitor-General, but that it did not apply to those cases where by express or implied contract, interest

was to be given, being to be considered as part of the debt. And that whether the contract was in writing, as on a promissory note, *with interest*, or by parol, made no difference, and that where there has been a course of dealing by which interest was always charged and allowed from a certain period, that was evidence of a contract *a priori* to pay interest, not on the ground of any custom or usage of trade, which he thought could not in such cases alter the law of the land, which allowed no interest on simple contract; but merely as evidence of an agreement in the particular case. He expressly desired to be understood that he did not mean to shake the common rule, and that he only meant to give interest as an exception in cases of actual contract, expressed or implied: See *Ex parte Mills*, 2 Ves. Jun. 295.

In England this rule was felt to be unjust to creditors, and the Legislature has interfered by giving interest on all claims proved; and it may be, now that attention has been brought to the subject, that in the event of another insolvent law being passed, the question will be dealt with.

I do not myself perceive, as has been suggested, that the section of the Act dealing with creditors holding security causes any difficulty. He will, if his claim bears interest, compute the interest up to the date of the insolvency in the same way as an unsecured creditor does, and will value his security to be deducted from the amount so computed and ascertained.

Nor do I recognize the difficulty which the learned County Judge refers to "as to reviewing all the claims and placing them on a dividend sheet;" the claim is not strictly in the nature of a dividend, and the original proofs disclose, or ought to disclose, whether the debts proved were payable with interest. If they were so payable that should necessarily have appeared before interest was allowed if due before the insolvency; if payable subsequently the fact of a rebate being made would be almost conclusive that the claim did not carry interest, but there would be no difficulty in cases of doubt in calling upon the

parties to make their claim and prove their title to interest or be precluded from all participation in the fund.

I do not think there need be any difficulty in computing the interest, the principle upon which that computation should be made having been settled in a number of cases.

In the case of *Bowen v. Marres*, 1 Cr. & Ph. 356, the learned Judge uses language very similar to that I have employed. The interest, he says, stops at the date of the commission, and though subsequent interest becomes due, it is not provable under the commission. The bankrupt's estate is taken from him by the commission, and the law, in order to make an equal division amongst the creditors, pays to each a division upon the debt proved. But this is merely an arrangement for the convenience of the debtor's creditors, the bankrupt continues indebted for the principal and interest accrued since the commission, although his certificate, if he obtains one, protects him against the liability of the debt, and being so indebted, payments are made out of his estate to the creditor.

It was held in that case that the doctrine of appropriation, which is founded upon the intention expressed or implied of the debtor and creditor, cannot have any place where the mode of payment is, as here, regulated by Act of Parliament, and that the creditor would be entitled to apply the payments received as dividends to the interest due before he would be bound to apply any part of it towards discharge of the principal, in the same way as if there had been no insolvency.

The Lord Chancellor refers in that case to a number of decisions in which this principle was acted upon.

I have felt considerable doubt as to whether the case is properly before us upon the petition filed by the inspectors, who acting under a resolution of creditors have directed the assignee to pay interest from the surplus upon such claims as bear interest.

The learned Judge below has held that they have no right to present such a petition. On consideration I have

come to the conclusion that the question has been properly raised in this way.

I think the distinction is well drawn by Lord Selborne, in the case of *Ellis v. Silber*,<sup>2</sup> reported in L. R. 8 Ch. 83, where he lays down the proposition : that that which is to be done in bankruptcy, is the administration in bankruptcy; the debtor and the creditors as the parties to the administration in bankruptcy are subject to that jurisdiction; the assignees as the persons entrusted with that administration are subject to that jurisdiction; the assets which come to their hands, and the mode of administering them are subject to that jurisdiction, and there are some other classes of transactions which under special clauses of Acts of Parliament, as under sec. 125 of our own Act, may even as regards third parties be so dealt with.

Under sec. 35 the inspectors are appointed by the creditors, with power to superintend and direct the proceedings of the assignee in the management and winding up of the estate. In the present case it appears that certain assets of the insolvent are in the hands of the assignee, which are to be handed over to the insolvent, with or without the deduction of the interest which the creditors claim.

The creditors themselves have by resolution requested the assignee to pay this claim of interest, although it is spoken of in the resolution as a further dividend, which is possibly not the correct expression, but the distribution of this surplus is involved in the winding up of the insolvent estate, and the assignee having declined to comply with the resolution, I think the inspectors were fully justified in the performance of their duty in making the application to the Judge, who had power to enforce the resolution, and give directions for the protection of the assignee.

I am of opinion, therefore, that the appeal should be allowed, and that the proper order for the learned Judge to make will be to refer the matter back to the assignee with a direction to compute interest on all debts proved



where there was an express contract to pay interest, or an implied contract to the same effect, as from the course of dealing or other circumstances, from which the law implies a contract to pay interest, or wherever an express statutory enactment has given interest *eo nomine* (as distinguished from interest which a jury may award in their discretion), as on *protested* bills, under 12 Vict. ch. 76, and on judgments and on other securities or contracts bearing interest, at the rate specified, or where the rate is not specified, at 6 per cent.

As to costs, I think that all parties should have them out the estate.

SPRAGGE, C. J. O., HAGARTY, C. J., and PATTERSON, J. A. concurred.

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## MACNAMARA V. MCLAY.

*Registrar of deeds—Fees on searches, &c.—Public inspecting books.*

In an action brought against a County Registrar to recover back alleged overcharges, it was shewn that the plaintiff had called upon the Registrar to search the books and indices in his office, and inform him of the persons named as grantees in the last executed deed of a certain lot; and also what incumbrances there were registered against it. There were 28 entries on the abstract index, and the Registrar charged for these services \$1.45, being at the rate of 25c. for the first four entries, and 5c. for each of the other entries.

*Quære*, whether the Registrar was bound to do, or could recover for doing what the plaintiff required of him; but *Held*, that as he had done it, the charge which the plaintiff had paid, and which was reasonable on the principle of the tariff, could not be recovered back.

The plaintiff told the Registrar that one A. owned a lot in the township of B., but was ignorant as to the number of the lot, and asked the Registrar to tell him what incumbrances there were against it, which the Registrar did, and charged for those services 25c. for ascertaining the number of the lot, and 25c. for searching for the incumbrances.

*Held*, that both were proper charges.

The plaintiff asked to examine an original conveyance in the registry office, informing the officer of the names of the parties thereto and the lands affected thereby, but did not tell him the number of the conveyance. The Registrar examined the index, for which he charged 25c., and 10c. for producing the document.

*Held*, also, to be proper charges.

The Registrar was required to produce the abstract index of a lot, which contained 180 entries, for which he required to be paid \$2 as for a general search, the plaintiff offering to pay 25c.

*Held*, (BURTON, J.A., and MORRISON, J.A., dissenting,) that the Registrar had charged \$1.75 too much.

The Registrar charged \$2.05 for an abstract of five folios—i.e., \$1.20 for searches, the remainder being for copying at the usual rate.

*Held*, the Registrar was entitled to those fees, though he only copied it from the index.

A Registrar when preparing an abstract is not bound to rely on the correctness of the abstract index, but may properly test its correctness by making all searches necessary for the preparation of the abstract; he may rely, however, on the index if he thinks proper, and charge the same fees as for searches. But if he gives a certified copy of the abstract index only he can charge no more than the rate per folio.

*Per* BURTON, and MORRISON, JJ.A.—The Registrar is the proper person to make searches, and he must produce the original instruments and the books containing copies thereof only, but not the abstract index.

*Per* SPRAGGE, C. J. O., and PATTERSON, J. A.—Every person interested in a lot of land is entitled to see the abstract index thereof for the purpose of making a search, as the book containing such abstract is one of those which the Registrar is bound to exhibit under the Registry Act.

*Per* SPRAGGE, C. J. O.—A Registrar, when required to furnish a copy of any document or entry, can make no charge for a search for the original.

*Ross v. McLay*, 25 C. P. 190, overruled in part.

THIS was an appeal from the judgment of Cameron, J., before whom the action was tried without a jury, at Welland, on the 18th of April, 1882, who ordered that judgment should be entered for the plaintiff against the defendant for \$4.65, with full costs of suit.

The statement of claim made in the Court below, as also the objections thereto, are clearly stated in the judgments. At the trial no evidence was adduced, the facts set forth in the statement of defence being admitted as true.

*W. F. Walker* for the plaintiff.

The defendant in person.

After taking time to look into the authorities,

April 28, 1882. CAMERON, J.—I find that the defendant did demand and receive from the plaintiff the sum of \$1.20 more than he was entitled to demand, in respect of the information and services in the first and second paragraphs of the plaintiff's statement of claim mentioned (a): and the plaintiff is entitled to recover the said sum as having been illegally exacted from him by the defendant.

I find that the defendant did demand and receive from the plaintiff the sum of twenty-five cents more than he was entitled to demand, in respect of the information and services in the seventh and eighth paragraphs of the plaintiff's statement of claim mentioned; and the plaintiff is entitled to recover the said sum as having been illegally exacted from him by the defendant.

I find that the defendant did demand and receive from the plaintiff the sum of \$1.75 more than he was entitled to demand, in respect of the information in the tenth and eleventh paragraphs of the plaintiff's statement of claim mentioned; and the plaintiff is entitled to recover the said sum as having been illegally exacted from him by the defendant.

(a) These and the following paragraphs referred to, will be found set out in the judgment of BURTON, J.A., post 326, *et seq.*

I find the defendant did demand and receive from the plaintiff the sum of \$1.20 more than he was entitled to demand, for the abstract in the thirteenth and fourteenth paragraphs of the plaintiff's statement of claim mentioned; and the plaintiff is entitled to recover the said sum as having been illegally exacted from him by the defendant.

I find the said sums so illegally exacted amount in the aggregate to the sum of \$4.65; and I find, as a fact, the same having been admitted by the plaintiff, that the several allegations in the defendant's statement of defence of what he was obliged to do to enable him to give the information and perform the duty required of him by the plaintiff are true, but that the matters therein alleged did not entitle the defendant to exact from the plaintiff the said several sums as above found to have been overcharged.

I therefore direct that judgment be entered for the plaintiff against the defendant for the said sum of \$4.65, together with full costs of suit, on the fifth day of the next Easter Sittings of the Common Pleas Division of the High Court of Justice.

I have decided this case in favour of the plaintiff, on the ground that the defendant, who appeared at the trial in person, admitted the fees exacted by him were not legally chargable if the decision in *Ross v. McLay*, 26 C. P. 190, correctly stated the law, which he disputes and wishes to test in the Court of Appeal. It is an authority binding on me, however, and as it covers all the illegal exactions, except that in the fifth paragraph of the plaintiff's statement of claim—which comes within the scope of the judgment—I follow it, without having so considered the case as to form any independent opinion upon the questions involved.

From this finding of the learned Judge the defendant appealed to this Court, contending that the decision in *Ross v. McLay*, referred to by His Lordship, was erroneous and ought to be overruled.

The appeal came on to be argued before this Court on the 13th of March, 1883.\*

The appellant, *McLay*, in person.  
*Clement*, for the respondent.

June 29, 1883. BURTON, J. A.—This is, in effect, an appeal from the decision of the Court of Common Pleas given in 1876, in the case of *Ross* against the same defendant, reported in 26 C. P. 190, and I may say, before proceeding to discuss the several claims referred to in the plaintiff's statement of claim, that I take a different view from that expressed by the majority of the Court on that occasion, as the right of the public to have access to the abstract index.

A very decided and perhaps, to some extent, not an unreasonable repugnance, was felt in England to any unnecessary exposure of the affairs and arrangements of the property of individuals, and to this is probably to be attributed the fact that up to this time the Registry Acts have not been extended beyond the counties of York and Middlesex; and no doubt the same desire to guard against any unnecessary exposure influenced the Legislatures of Great Britain and of this Province, when they provided for the registration by means of a memorial wherein the dates, parties, description of the property, and the names, additions and residences of the witnesses were alone required to be set forth, it being the clear intention of the original Acts, that there should be no greater exposure of a title than would have the effect of guarding a purchaser against secret conveyances, and to act, as it has been observed, as a beacon to warn against fraud, so that where a purchaser discovered, by means of the registry, that any deed had been executed affecting the property in the purchase, or upon the security of which he was about to advance his money, if he did not require a satisfactory explanation or the production of the deed it was his own fault.

It is true that the Legislature here so far departed from

\**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

the policy I have referred to in the Act of 1865, as to require the deeds or other instruments to be registered in full, but bearing in mind that the principal object of registration is to afford to an intending purchaser or mortgagee the means of ascertaining that the title of the alleged owner is as it appears to be on the face of the title deeds produced, we should, I think, require very explicit language to be used before we could come to the conclusion that it was intended that the indices of the registry office were to be open to the general inspection of all comers on the payment of a nominal fee. My own view is, that the general intention of this Act, as of the former Act, was still to leave with the registrar the entire control and custody of the books, and further, to give confidence and security to intending purchasers by a clear and simple index, but not in any way to subject, unnecessarily, the affairs of individuals to the impertinent curiosity of persons in no way interested in a particular property.

I can imagine nothing more dangerous than thus to give to a class of persons not inaptly styled "land sharks," an opportunity at a minimum of expense to discover defects in title, and aid them in their nefarious trade, to say nothing of the risk to which the registrars might thereby be exposed of alterations being made in figures, or other particulars in the abstract index, and thus leading the registrar to furnish an incorrect abstract.

What then is there in the Act (31 Vict. ch. 20, O.) to lead to the conclusion that such a fundamental change was intended?

It is said by one of the learned Judges of the Common Pleas that the words of sec. 22 lead to such an inference. The concluding portion of that section is: "And all such books so furnished, used, and kept, shall be deemed to be the property of Her Majesty, for the use and benefit of the public."

When we bear in mind that under the former Acts the registrars furnished their own books, and had on more than one occasion claimed to remove them after ceasing to be

registrars, on the ground that they were their private property, *and did not belong to Her Majesty for the use of the public*. we can see a very sound reason for this enactment without attributing to it the meaning contended for.

Nor do I think we are at all aided in the construction of the statute by the fact that a certain allowance was made to the registrars for the preparation of the abstract book for registrations made previously to its coming into operation.

Mr. McLay very frankly admitted that in his case (his county being a new one) he was amply remunerated for making these abstract indices, but it is a fact so notorious in the case of other counties, that we might almost take judicial notice of it, that the sum fixed by the statute was wholly inadequate; and it was stated that the Government refused all applications to increase the amount on the ground that the registrars would be indirectly recouped by the facility with which they would in future be enabled to furnish their abstracts; but considerations of this nature are purely speculative, and cannot aid us in construing the statute. We have to place our interpretation on the words used, and we cannot hold that any change in the law has been made, unless they clearly lead to such a construction, nor increase the fee beyond what they fairly import, however inadequate that fee may be in our opinion for the services rendered and risk incurred, nor reduce it, although it may in our judgment be far in excess of a fair and reasonable remuneration.

I see nothing in the language of the present Act to lead to the conclusion that the judgment of the Queen's Bench, delivered by the late Sir John Beverley Robinson, in *Webster and the Registrar of Brant*, 18 U. C. R. 87, would have been different if the application had been made under it, instead of the 9th Vict. Indeed, some of the language of that learned Judge seems to point to some of the evils to which I have referred, as rendering it highly inexpedient that such a change should be made, and I cannot avoid feeling that it ought at all events to be left to the Legislature so to

decide in express terms, and not for the Courts so to declare upon language not necessarily bearing any such meaning, or upon what they may conceive was the intention of the Legislature in making the change from the former inconvenient to the present reasonable and simple form of an abstract index. That this is the proper construction of the Act is, in my opinion, further borne out by the following considerations :

The registrar is, by the Act, the party authorized and required to make searches.. He is not bound to do so except upon tender of the legal fees, and if he requires it upon a requisition in writing, pointing out the specific information which the applicant requires, a thing utterly unnecessary and unmeaning if the applicant is entitled to make the search himself by examining the index book. It can scarcely be gravely contended that the looking for the index book, and placing it in the hand of the applicant, or even opening it at the page where the title to the lot inquired about is to be found, is a search. If it is, it is not a search for which the Act authorizes a charge, which is for searching the indexes, not searching for them. That book contains the information from which the registrar is enabled to answer the inquiry, which the applicant may limit as he thinks proper, but which, as I have before said, the registrar may require to be in writing, and is then bound to answer. If the applicant is satisfied with the information thus furnished, he pays for it on the scale fixed by the statute, that is, twenty-five cents for the entries inquired about not exceeding four, and five cents for each subsequent entry.

So much for the searches. But if, in addition to the information thus obtained, the applicant desires to see any of the original registered documents referred to in the index, he can exact it without a demand in writing on payment of an additional fee of ten cents, or if he is satisfied with an inspection of the copy to be found *in the books of the office relating thereto*, he can exact that without further charge, but even then these books or documents



to think that the registrar was in strictness entitled to a larger fee than he has charged, but that fee, at all events, was, in my opinion, legally exacted.

The second claim is stated as follows:

"4. The plaintiff desiring information relating to the title of a certain other lot of land in the township of Brant, owned by one Jacob Bergeys, the number of which the plaintiff was ignorant of, requested the defendant, as such registrar, to inform him, the plaintiff, what incumbrances, if any, appeared from the books of defendant's office to affect said lot, without giving to the defendant any particulars of the lot other than the name of the owner and the township in which the same was.

"5. The registrar demanded from the plaintiff the sum of 50 cents as the fees he was legally entitled to receive before being bound to impart such information, which the plaintiff thereupon paid, and was then, and not before, informed by the registrar that there was a mortgage upon the said lot undischarged for the sum of \$2,000.

"6. The plaintiff charges that the registrar was entitled to demand and receive for such duties the sum of 25 cents, and that he illegally exacted from the plaintiff the sum of 25 cents."

It appears to me that the charge made by the defendant was correct.

It was absolutely necessary to search in the alphabetical index to ascertain whether the person named owned any land in the township, and having ascertained that he owned some land, to inquire from the applicant whether that was the lot the title to which he desired to be investigated. For this second search there can, I should say, be no question that he is entitled to an additional fee. As to this item, therefore, the plaintiff fails.

The third item of claim is thus stated :

"7. The plaintiff wishing to obtain information contained in a mortgage made by one Ernst Schmidt and wife to one John H. Schmidt, on lot number 26, in the 9th concession of the township of Carrick, in the county of Bruce, informed the registrar of the names of the parties thereto, gave him a description of the land as above mentioned and requested the defendant as such registrar to exhibit

to him the said mortgage, but was unable to and did not inform the defendant of the number under which said mortgage was registered.

"8. The registrar demanded from the plaintiff the sum of thirty-five cents, as the fees he was legally entitled to receive before being bound to exhibit said mortgage to the plaintiff, which the plaintiff thereupon paid, and was thereupon shewn the said mortgage by the defendant

"9. The plaintiff charges that the registrar was entitled to demand and receive for such duty the sum of ten cents, and that he illegally exacted from the plaintiff the sum of twenty-five cents."

If the plaintiff had stated the number of the instrument, I think it clear that the registrar would have been entitled, only to the fee of ten cents, for searching for and exhibiting the instrument so indicated; but it must, I think, be equally clear that if the registrar is compelled to search in the abstract index book for the information which the plaintiff could not furnish, he is entitled to be paid for it.

The reasonableness cannot be better illustrated than it was by the registrar himself, when stating his case in argument, viz., that if on investigation of the abstract index it had appeared that no such document was in the office, he would be entitled to a search he cannot be less entitled because by reason of his search the plaintiff was enabled to ascertain the number of the instrument which he desired to see. Having ascertained this, the registrar was only entitled to ten cents for producing the document, including the search among the records of the office for it. The charge made, therefore, was warranted in law.

I have in effect, in what I have before stated, given my opinion upon the fourth item of claim, which is in these words:

"10. The plaintiff requiring information respecting the title to and incumbrances affecting lot 28, concession 8, township of Carrick, requested the defendant as such registrar to shew him the abstract index book relating to said lot, and tendered to the defendant the sum of twenty-five cents, as the fees he was legally entitled to for such service.

" 11. The defendant refused to exhibit the said abstract index for such fee, and demanded and received from the plaintiff the sum of two dollars as his fee therefor, which the plaintiff was compelled to and did pay to the defendant for such search.

" 12. The plaintiff charges that the defendant illegally exacted from the plaintiff for such last mentioned service, the sum of \$1.75."

If the plaintiff's contention be correct, then under pretence of searching the title to ten acres, part of a lot of 200 acres, and paying a fee of twenty-five cents as for that search, the applicant could search the title to several parcels of the same property.

In my view the registrar was entitled to furnish the information asked for, and as the number of references upon the lot amounted to 180, the registrar was entitled to his full charge of two dollars, not a very unreasonable amount for such a service.

It makes no difference, in my opinion, that the registrar as a matter of courtesy allowed the applicant to search himself. The case shews that the search he did make involved that number of references, and the deputy registrar attended, whilst the plaintiff himself, by his permission, made the searches.

There is one remaining claim, which is set forth thus:

" 13. The plaintiff required from the defendant, as such registrar, an abstract of the title to Lot 74, concession 1, north of the Durham road, township of Brant, containing the particulars following: The numbers under which the instruments are registered, the dates of execution and registration, names of the parties to the same, the considerations, and the kind of instruments.

" 14. The defendant thereupon prepared for the plaintiff such abstract from the abstract index relating to said lot, and demanded from him therefor the sum of \$2.05, which sum the defendant stated to the plaintiff was made up as follows, namely: 85 cents for five folios of words, including the certificate to said abstract, and the sum of \$1.20 for searches, which the defendant claimed he was entitled to, although he admitted that he had obtained all the facts he required to make said abstract from the abstract index

book, without referring to the other books or instruments in his office. The plaintiff paid said \$2.05 to the defendant, and received from him the said abstract.

"15. The plaintiff charges: The defendant, as such registrar, was entitled to demand and receive for such abstract the sum of 85 cents only, and was not entitled to charge the \$1.20 for searches which he had not made in order to obtain the information required to make out said abstract, and that he illegally exacted same from the plaintiff."

If the plaintiff's contention be correct, it will always be cheaper for a party, instead of requiring a search to be made, to order an abstract, when he will get all the information he requires for the mere expense of the manual labour of the registrar or his clerk in copying the abstract index. It appears to me that thus viewed the objection furnishes its own answer.

The registrar has already made the searches and prepared an index with care, which prevents the necessity of going through the same labour again when applied to for the information contained in it, but there is no reason for the applicant getting the benefit of that labour without paying for it. My view of the section is, that the fee allowed is for the certificate, but does not include the charge for searches.

The registrar was not bound to trust to the abstract index. Assume such a case as this. An application is made to a registrar recently appointed in the very terms in which the application was made in the present case. He would find an abstract index prepared by his predecessor, but if he furnished a copy of that he would be responsible for any errors it might contain; he prefers, therefore, to make the searches in the books, and would unquestionably be entitled then to charge. It appears to me to be no concern of the plaintiff whether the searches were again made, or the abstract prepared from materials in the possession of the registrar which enabled him to dispense with an actual search.

I am of opinion that the plaintiff fails in this case also.

In confirmation of the view that I have expressed as to the right of the Registrars to refuse inspection of the index, I would remark that the language of the Imperial Act referred to by the then Chief Justice of the Common Pleas (2 & 3 W. IV. ch. 87, sec. 7) is widely different; it is, "All persons interested in making searches in the said register office shall have full liberty to search and examine the index, abstract, and transcript books thereof, and to take abstracts or other short notes of any of the matters in such books, and also to inspect, in the presence of some person belonging to the said office any original memorial to which reference shall be obtained in such searches."

We have nothing to do with the policy of the law, if we are clear that the language under the Act effects a change; but entertaining the view which I have expressed as to the settled policy of the Registry Acts since their first introduction, and that very grave objections exist to allowing access indiscriminately to the books, I think the language should be unmistakeably clear, and upon the short ground that there is nothing in the Act to alter the law established in *re Webster & Brant*, 18 U. C. R. 87, I think the registrar could refuse to allow the applicant to make the search himself.

The result is, in my judgment this appeal should be allowed, and the judgment below reversed.

PATTERSON, J. A.—The plaintiff, as to one lot of land, required the registrar to do these things:

1. To search the registry books and indices in his office:
2. To inform him of the name of the grantee of the last executed deed affecting the lot:
3. To inform him what incumbrances, if any, appeared in the books affecting the title.

It is not contended that the registrar was expected or that it was necessary for him to look anywhere but in the abstract index of the lot, for the information.

From the copy furnished to us by the defendant, we

learn that the abstract index contained twenty-eight entries, from that of the patent which was issued in 1852, down to a discharge of mortgage in February, 1881, which explains what the defendant means when he says in his statement of defence that there were twenty-eight *references* entered on the abstract index book relating to the lot. I certainly should not have known without some such explanation what was meant by a reference entered on the book; but now understanding it to be a term which the defendant misappropriates from the statute, and employs, though inaccurately and not in the same sense as the statute, to express the entries relating to any one conveyance or document, and taking the facts which he states to be admitted, as they are, by the plaintiff, we can see what he actually did in order to render the service demanded. He says:

"1. That there were twenty-eight references entered on the abstract index book, relating to said lot, all of which he had to search carefully in order to ascertain the name of the grantee to the last executed deed registered.

"2. That in order to ascertain what incumbrances, if any, affected said lot, it was necessary a second time to search said references, and make a list in writing of the number and amount of each particular mortgage. That as the result of such search, he ascertained that eight mortgages had been registered against said lot, amounting in the aggregate to \$11,554.

"3. That the defendant had necessarily to make a third search of the references, to ascertain which, if any, of such mortgages had been discharged, deleting each discharged mortgage from his written list as he proceeded.

"4. That as the result of such examinations of said references, the defendant ascertained that out of the eight aforesaid mortgages three still remained undischarged in his books, the amounts of which, together with the names of the mortgagees, he had supplied to the plaintiff."

I speak of the facts admitted, being the things which the defendant says he did, not the necessity which he asserts for perusing the abstract three several times. He only charges (on the scale he claims) for one perusal, and it

is obvious that he could not have given the information without possessing himself of all that was in the abstract, and then bestowing some thought upon it.

Before noticing the particular items charged, I may as well state my view of some things in the statute on which different opinions have existed. One of these is the right of a person interested in any lot of land to see the abstract index of that lot. I take the same view of this as was acted on by the Court of Common Pleas in *Ross v. McLay* 26 C. P. 190. I think the right exists, and I agree with nearly all that was said in support of that view in the judgment of Hagarty, C. J., in that case, or I may perhaps more properly say that I agree with all that he said upon that subject, although I may not think the argument requires or receives assistance from the provision of the statute that the books furnished are to be deemed the property of Her Majesty for the use of the public, because I take the use there alluded to to be merely such use as the statute elsewhere says or shows the public is to have of them.

What struck me as an argument of some force on the score of policy, against allowing the books to be for any time in the hands of any one but the registrar, that is to say, the risk of injury or alteration, seems to lose its weight in the face of the registry law which has prevailed for the last seventeen or eighteen years. The argument could not be better put than as we find it in the judgment of Sir J. B. Robinson in *Webster and the Registrar of Brant*, 18 U. C. R. 87. That was an application for a mandamus to compel the registrar to allow a person, who professed to desire to ascertain what judgments were registered against a particular man, to inspect the alphabetical index of certificates of judgments; asking also to inspect other records, but without laying any foundation except as to judgments. That application was refused on several grounds. Upon the general question the learned Chief Justice said: "If we were to grant a mandamus in the terms moved, meaning it to be used for the purpose for



which it was stated in the argument to be desired, we could not profess to found the command upon any thing laid down in the statutes as being the duty of the registrar ; and if it should happen that a leaf or more of an index, or the index itself, should disappear, or any document be altered or mutilated, it would be little satisfaction to the public that the registrar should be enabled to say that these documents had been freely and unavoidably put into the hands of any and every body by the order of this Court, though that certainly would go far towards relieving the officer from all blame. The registrar may put his index or other books into the hands of others to make a search, instead of searching himself, but he does that in his discretion, and upon his responsibility. If he were commanded to do it freely whenever asked, he must be taken to have no discretion in the matter, and would be relieved from responsibility, and unable to answer for the security of his books and papers." That judgment was delivered in 1859, and proceeded upon the considerations that the statute did not in terms make it the duty of the registrar to do what was asked, and that the policy which commended itself to the Court as sound policy told against the right of the applicant. But in 1865, a new registry law was passed (29 Vict. ch. 24) the 18th section of which expressly made it the duty of the registrar when required, upon being tendered the legal fees for so doing, to make searches, and furnish copies or abstracts of or concerning all memorials, &c., &c., and to exhibit the original registered instrument, *and also the books of the office relating thereto*, whenever the party desired to make a personal inspection of such books. There was nothing in this which, if it had been in force in 1859, would have necessarily led to a different decision in Webster's case, because what was asked for there was not the inspection of any particular original instrument, or of the books of the office relating to any such instrument ; but the express statutory right declared to inspect instruments and books, indicated that the general policy enunciated in Webster's case no longer prevailed.



After confederation, the Ontario Legislature passed the Registry Act 31 Vict. ch. 20, adopting in section 20 the 18th section of the Act of 1865, adding the caution, "but no registrar shall allow any such book or instrument to be taken out of his possession or custody." That is the provision now found in R. S. O. ch 111, sec. 23.

The abstract index was first established under the Act of 1865. Before that time the law had required an alphabetical index of the names of grantors and grantees, but although there always was what is sometimes called a figure index, or a list, kept in connection with each lot, &c., as granted, of the numbers of the registered instruments affecting that lot, I have not been able to find any statutory direction for keeping it. Up to 1865 from, I believe, 1853, one item of the tariff of fees for registrars was in this form: "For searching the records relating to the title of any lot," &c. The Act of 1865, which established the abstract index, altered the expression, making it "For searching the *registry books and indexes* relating to the title," &c., and that form of expression has been retained: (R. S. O. ch. 111, sec. 92.) These "indexes" do not include the alphabetical index, for searching which a separate fee is provided.

The "index relating to the title to any" lot is the abstract index, or includes that index if there is any other. It is thus expressly dealt with as the subject of a search in the same way as a registry book. They are classed together in the clause respecting payment for the search. Then when we look back at the clause which casts upon the registrar the duty of making searches (sec. 23, of the Revised Statute), and find the right there given to make personal inspection of the books, there does not appear to me to be any tenable ground for hesitating to recognize the abstract index book as one of those books that may be inspected. On the contrary, it strikes me that whatever reason can be given for excluding from personal inspection a book of this kind, which is only an index and is required to be kept from motives of convenience only, would apply with

greater force to the records on which titles may depend, and which certainly must be produced when required.

Returning now to the first question before us, we have the defendant's charge of \$1.45 objected to as to all but 25c.

He is entitled, under sec. 92, "For searching the registry books and indexes, \* \* when not exceeding four references, twenty-five cents, and five cents for every additional reference ; but in no case shall a general search into the title to any particular lot, piece or parcel of land, exceed the sum of two dollars." The plaintiff insists that one sum of twenty-five cents is all the defendant can claim, while the defendant computes one reference for each entry, and charges \$1.45, which is correctly computed for twenty-eight references.

The only doubt this item has occasioned in my mind has arisen from the service asked and rendered being something for which I do not understand the statute to provide.

I understand the duty cast upon the registrar in the matter of searches to be ministerial in its nature. It is no part of that duty to construe a document or give an opinion upon its contents. He must search for the entry or the document desired, and exhibit it, or communicate its contents, as the case may be, to the inquirer. He would be bound to search for the abstract index of a lot, and to shew it if required, as I interpret his duty, or to communicate its contents by copying them, or such part as might be asked for. But that is not what he was desired to do. He was desired to do for the plaintiff what the plaintiff might have done for himself if he had chosen personally to inspect the index. In doing that he necessarily had as before remarked to inform himself of the whole contents of the index, and to deduce from that information the results which the plaintiff was seeking.

Now, if the plaintiff had asked to see the index, the defendant must have searched for it in order to produce it. For this reference to the proper book, and the proper page of the book, he would, if no further reference were required

of him, be entitled to twenty-five cents, but he would be bound to make three more references, if needed, for the same fee. He was not, however, bound to do the other things, namely, to ascertain which of all the instruments registered were deeds of grant; and which was the last executed of those deeds; and which of the instruments created incumbrances; and which of those were subsisting incumbrances. He might, as I understand his duty, have declined to undertake the task. If he were now suing for payment for it, there might be room to question his legal right. But the plaintiff paid him for the service, which involved the performance of acts not foreign to his office though not compulsory on him, which, on the principle of the prescribed tariff, would at the very least have entitled him to what he has been paid. There is therefore no reason on the score of the amount of money why we should order it to be repaid to the plaintiff; still less can he ask for the declaration which is what he really seeks, that the defendant was bound to render the special service for the minimum fee attached to an ordinary search.

The second item of complaint is for an overcharge of twenty-five cents in the sum of fifty cents. The plaintiff tells the defendant that one Jacob Bergeys owns a lot, the number of which he does not know, in the township of Brant, and he asks the defendant to tell him what incumbrances, if any, affect that lot.

The defendant could only ascertain the lot by searching the alphabetical index. For that a fee of twenty-five cents is allowed by a separate clause from the one before quoted. The request of the plaintiff necessarily involved the request to make that search. The duty, under sec. 23. (I refer to the Revised Statute), was to search concerning instruments registered mentioning any lot, &c. The applicant's part was to name the lot concerning which the search was to be made. The registrar's answer to the request if nothing were involved in it more than as stated in words, would properly be, 'I cannot make the search into the title until I know the lot. Tell me the lot and I will make the

search." The search of the alphabetical index was therefore a search for the information of the plaintiff, to enable him to tell the defendant of what lot he wanted the title searched. That information having been obtained at an expense of 25c., and the lot proving to be No. 29 in the 5th concession, the plaintiff, in effect, asks what incumbrances affect No. 29, in the 5th concession of Brant; and having been furnished with that information for no further charge than one other sum of 25c., I do not see that the complaint can properly come from his side.

Then, as the third instance, the plaintiff goes again to the defendant wishing to see an original document, the number of which he cannot state, and which the registrar cannot search for until he knows the number. His direct answer of course is, "I cannot search till you give me the number of the paper you want;" and the plaintiff has to resort to means, which happen to be in his power, to find the number. He knows the names of the parties to the deed and the land affected by it. By getting the registrar to search for the abstract index of the lot he can find the number. That search is accordingly made, and the number ascertained. The charge for that search is by the statute 25c. It is a search of the abstract index, such as I have before spoken of. Then having the number, the registrar is able to search for the paper it belongs to, and having found it to produce it. Those two services, the search for the document and the production of it, are covered by one fee of ten cents. "For exhibiting in the office each original registered instrument, including search for the same, ten cents."

The defendant charged thirty-five cents in all. I think he was clearly entitled to both the charges. In this I differ from one of the findings in *Ross v. McLay*.

In the fourth particular in question, I think the defendant was decidedly unwarranted in the charge he made.

He was asked to exhibit an abstract index, twenty-five cents being tendered for the search; but he demanded and received two dollars as for a general search, because one

hundred and eighty instruments were abstracted on that index—treating his production of the index as a reference by him to each of those instruments or entries. I have already said all that is necessary to shew my opinion that the plaintiff had a right to inspect the index, and from that it follows that one sum of twenty-five cents was all that I think the defendant was entitled to. He puts his claim upon one or two grounds that are not wanting in ingenuity, and he may possibly have shewn some reason for a reconsideration by the Legislature of the question of the registrar's duty and rights in respect of these indexes, and perhaps for a definition of the use to be made of them; but I do not think they can be sustained under the law as it stands.

Two of his suggestions are based on the same kind of *pseudo* critical reading of the statute.

He refers to sec. 23 as only authorizing the production of a book in connection with an original document, and to sec. 92 (or the equivalent sections in the Act of 1868), as only permitting a search of the index in connection with the registry books.

It is scarcely necessary to point out the fallacy of this. If the index cannot be searched unless you also search the book, neither can you search in a book for a document whose number, &c., you know without also searching the index; and the defendant would have violated the law in producing the original document which is the subject of the third charge, if the plaintiff had been able to tell the number of it; and, on his own argument, he actually did violate the law by charging for a search in the abstract index to ascertain the number, that search being unconnected with any search in any registry book.

Then the defendant tells us, and the plaintiff admits, that while the plaintiff was reading the index, the deputy registrar was in attendance, and was ready to make any search the plaintiff required.

No doubt it was the defendant's duty to have some one there ready to make searches for who ever lawfully required

them, whether he was engaged in reading an index, or came to the office only to have the search made. All comers were entitled to that attention. But that it was the duty of the deputy to abstain from all other work is not so plain. If he had to do so in order effectually to preserve control of the index book and protect it from injury, he was in my judgment inadequately paid by the twenty-fivecents, and the Legislature might properly make further provision on the subject. But I do not see how, under the present statutes, the tariff can justify more than the amount tendered. On this head, I think the plaintiff entitled to a return of \$1.75.

There remains the fifth charge, and upon it, while the facts seem to be essentially the same as in *Ross v. McLay*, I do not see my way to treat them as they were treated in that case.

I read the plaintiff's statement of this branch of his case :

[The learned Judge here read paragraphs 13, 14, and 15, of the statements of claim, as set out in the judgment of Burton, J. A., ante p. 330.]

Leaving out of view the allegation that the information furnished, which was what was asked for, was obtained immediately from the abstract index, the charge is not objected to. The fact relied on is that it was simply a copy of the abstract index. If the plaintiff had asked for a copy of the index, the defendant would certainly have been confined to the proper charge for that. I do not say to the price per folio for copying merely, which is all the plaintiff would concede to him, for I think he would have had a right to 25c. more for searching for the index. But the plaintiff neither asked for a copy, nor did he, if he knew it to be a copy only, by any acceptance of it as a copy only, consent to free the defendant from the responsibility attaching to the demand in the shape it was made as for an abstract of the title. If it had happened that some deed had been omitted from the index the defendant would have been liable to the fate of the defendant in

*Harrison v. Brega*, 20 U. C. R. 324. I do not perceive any reason why a registrar who is asked for an abstract of title by say an intending purchaser, and who has the day before prepared from actual searches a similar abstract for another inquirer into the same title, should not send, in compliance with the second requisition, a copy of his first abstract, and charge the full price for each. In practice that course would always be taken, and no one would be injured or defrauded by it. The accident of the original being in the abstract book which the registrar had made himself from actual searches, and which saved him the useless toil of going over the same ground, instead of being in his copying book or in his draft, cannot make any substantial difference.

The fact that the defendant had himself actually made the searches, and so was certifying to what he had himself verified, is of consequence, and will distinguish the circumstances from a possible case in which a registrar who has the custody of an index which he neither made nor verified, may impose a copy of it upon one, who applies for an abstract of the title. Such an applicant would, I apprehend, be always entitled to the personal verification by the registrar, or by some one acting for him, of whatever he certifies, and ought not to be left to rely on his responsibility in case there happened to be errors in the work of a careless predecessor in office which he chose lazily to adopt as his own. If he certified it as a copy of the abstract index, or if such a copy were all that was asked, the responsibility would be confined to the accuracy of that as a copy. That is not the case here, and I think, therefore, the defendant's charge must be sustained.

It may avoid misapprehension to add that I am giving no opinion of a general nature as to whether a registrar can charge for a search for any instrument he may be asked to abstract or copy, or is confined to the fees named in the fourth sub-section of sec. 92. I do not understand any point of that nature to be raised by the charge last discussed, which I have treated, as it is put by the plain-

tiff in his statement, as raising only the question whether acts can be charged for which were essential to the making of the abstract asked for, but were not made for the immediate purpose of the application.

The result of my judgment is, that the plaintiff's judgment should be reduced to \$1.75. The appeal succeeds as to four of the five items, and, therefore, the defendant ought not to pay any part of the plaintiff's costs, but as he does not entirely succeed, he must bear his own costs.

SPRAGGE, C. J. O.—I agree in the first item being allowed, but only in the qualified way in which it is put by my brother Patterson—not that a registrar can be allowed *qua registrar*, to exact payment for any services outside of his duties as registrar, and outside of the fees authorized by the tariff.

Further, where the registrar is simply asked to furnish a copy of any document or other paper, or of any entry in any book in his office, I do not see any thing in the tariff to warrant his search for the original. The minimum allowance, 25c. for copy, with further allowance per folio furnished from other public offices is against the allowance when beyond a certain length, covers the certificate which has to be given by the registrar. The allowance for searches given by the tariff does not seem to me to apply to such a service as this, and the analogy of copies being of the charge. Where a copy is required of something contained in an official book, *e. g.*, of a decree, or order, or judgment, or of some document, in any of the Courts, a separate fee has, I believe, never been allowed, or even asked for, as for a search for it. The something, whatever it may be, of which a copy is required, is to be found in a book or on the files of the office—is, in fact, in the possession of the registrar. The tariff allows him so much for making a copy of it; he has, of course, to find it, in order to do this; but I see no reason or authority for his making a charge for finding it. The charge is ingenious, but I think has nothing else to recommend it.



As to the fifth item of charge, I suppose, put in the shape that it is, that we cannot properly disallow it. It looks to me as if this may probably be a friendly suit, the questions being put in a shape calculated, if not directly intended to elicit from the Court its sanction to the allowance of items of charge as a general rule which ought to be allowed only under the circumstances stated in the pleadings. It is material in pronouncing upon the validity of this item to see exactly what is the case put in the pleadings. They shew what the plaintiff must be taken to have required of the registrar, and they shew for what services the defendant makes up his charge of \$2.05.

If the plaintiff had asked simply for a copy from the abstract book of the entries relating to the lot, the registrar would have been bound to furnish it at the tariff charge per folio. In that case the registrar would have been responsible only for the accuracy of the copy ; not for the accuracy of the abstract book itself, if, as put by my brother Burton, it had been made up by the defendant's predecessor in office. The defendant puts his case succinctly at p. 8, paragraphs 1, 2, and 3 under that head,\* and I cannot say that he was wrong, looking at what was asked of him, and the responsibility thereby incurred. In the case, however, of an instrument registered by himself, it being his duty to register correctly, and also to make a correct entry in the abstract index book of such registra-

\* These paragraphs were as follows :

"1. That under the Registry Act the registrar and his sureties are bound and held responsible for any neglect, omission, or mistake committed by him in the performance of his duties as such registrar.

"2. That it in no way concerned the plaintiff out of which book or books the defendant obtained the information that enabled him to supply the plaintiff with abstract of title required, provided such abstract of title was correct in every particular, and satisfactory to the plaintiff, and contained all the information desired and requisite for the plaintiff's purpose.

"3. That the defendant did not then find it necessary to make any search among the books or instruments in his office, except in the abstract index book, to furnish to the plaintiff the abstract he required, because defendant had previously made a careful comparison of the references in

tion, and the fees for registration covering all that he is entitled to for those services, I do not mean to say that he would not be responsible for the accuracy of all that he did, in whatever shape he put his certificate upon furnishing a copy of the entries in the abstract index book. But we do not know how that may have been. Some of the registrations as to which he was required in this instance to certify may have been by his predecessor, and some by himself, or all by his predecessor. With no more information before us than is furnished by the plaintiff's statement of claim, we cannot say that the defendant is wrong.

My brother Patterson has gone so fully into the questions discussed upon this appeal, that I have not thought it necessary to go further into them, than I have done. What I have added has been for the purpose of avoiding misapprehension upon the questions raised. I agree generally with the judgment which my learned brother has just delivered.

I think it proper to notice that it appears from the papers put in by the defendant that the abstract index book is in one respect defective. It does not give the considerations expressed in any instrument registered, except in the case of mortgages. In the form given in 31 Vict. ch. 20, in column 8 of sec. 30, the heading shews that the consideration expressed in all instruments should be given, and this is still more distinctly required in the corresponding column of schedule M. in the R. S. O. ch. 111, the heading being; "Consideration in conveyance or amount of mortgage money." This omission of the registrar appears to have escaped the vigilance of the inspector.

the abstract index book with the original instruments themselves, and he had also shortly before furnished an abstract of title of the same property to another person when he made a further comparison of the references in the abstract index book to the registrations in the registry books, so as to be certain that no mistake had been made in the entries in the abstract index book. That the defendant charged the said other person and received from him the same fee as he charged the plaintiff, and that the fee of \$2.05 so received was the lawful fee paid by the plaintiff to the defendant for his services.

The judgment will be varied in the points indicated. It is, indeed, only in regard to the fourth item that any actual change is made.

The parties inform us that the costs, as well of the appeal as of the suit before appeal, have been made the subject of private agreement between themselves.

MORRISON, J. A., concurred with BURTON, J. A.

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THE CANADIAN BANK OF COMMERCE V. WOODWARD ET AL.

*Accommodation Note—Security for payment of Note—Renewal Note.*

The defendants made a note for \$200, to one M. to assist M. in retiring paper in which defendants were interested. M. discounted his own note for \$200 with the plaintiffs, depositing with them the defendants' note as collateral. When M.'s note fell due, the defendants' note being then overdue, he paid \$25 and gave a renewal for \$175, leaving defendant's note with the plaintiffs :

*Per WILSON, C.J.*—Defendants' note was not an accommodation note ; but assuming it to be so ; *Held*, that the proper inference from the evidence was that it was transferred to the plaintiffs as security for the debt represented by M.'s note, not for that note specially ; and that the defendants remained liable.

THIS was an appeal by the plaintiffs from the judgment of the Judge of the County Court of the County of Wellington, discharging an order *nisi* to set aside the verdict entered for the defendants, and to enter judgment for the plaintiffs.

The action was on a promissory note made by the defendants in favour of one J. C. McLagan, and by him indorsed to the plaintiffs, as collateral security for a note of McLagan's, for \$200 then discounted by the plaintiffs.

The defence principally relied on was, that the note sued on was made for the accommodation of McLagan, without any value or consideration therefor ; and that the same was indorsed and delivered to the plaintiffs as collateral security for a note of McLagan's for \$200, then discounted by the bank, and which it was alleged had since been paid by McLagan.

At the trial before the learned Judge, without a jury, the defendant Woodward was examined as a witness on behalf of the plaintiffs, and in the course of his evidence swore that the note had been given to McLagan, as " he wanted a little assistance to retire some paper of ours on him that was coming due ; he wanted a little assistance, and it was given to him as an accommodation, he agreeing to retire it when it came due, \* \* and was to be used for no other purpose."

The evidence shewed that when McLagan's note for

\$200 fell due he did not pay it, but paid \$25 on account, and gave a new note for \$175, and the defendants insisted that, under the circumstances, the bank could not hold their note as security for the renewal note; that in short the note intended to be collaterally secured by them had been paid.

The plaintiffs, in April Term, 1882, moved for a new trial, which the County Court Judge refused, with costs. Thereupon the plaintiffs appealed to this Court, and the case came on for argument on the 13th of September, 1882.\*

*J. K. Kerr*, Q. C., for the appellants.

*Johnson*, for the respondents.

*Griffiths v. Owen*, 13 M. & W. 58. *Belshaw v. Bush*, 11 C. B. 191; *Lumley v. Musgrove*, 4 Bing. N. C. 9; *Kendrick v. Lomax*, 2 Tyr. 438; were referred to.

Dec. 29th, 1883. WILSON, C. J.—The facts are, McLagan the principal debtor gave a promissory note to the plaintiffs, dated 13th July, 1880, for \$200, which the plaintiffs discounted on the deposit of the note now sued on, made by the defendants payable to McLagan, and indorsed by him to the bank.

The note for \$200 was not paid at maturity. But \$25 only of it was paid, and it was renewed on 16th November 1880, for the balance, \$175, and the note now sued on, which was collateral security for the payment of the \$200, was retained by the bank as collateral for the renewal of \$175. The note now sued on was given, it is said, for the accommodation of McLagan; if so, the bank did not know it was an accommodation note.

The note for \$200 matured on 16th November, 1880, and at that time the note sued on, the collateral note, was past due, and was so when the note by way of renewal for \$175 was given.

\* Before WILSON, C. J., GALT and OSLER, JJ., under order of 2nd September, 1882, ante vol. 7 p. 454.

The note sued on was given by the defendants to McLagan, to assist him in retiring some of the defendant's, own paper then coming due; McLagan agreeing to retire it when it fell due. So Woodward said. The evidence does not sustain that; the most it shews is that McLagan agreed to pay the note at maturity.

For the plaintiffs it was contended before us that the renewal of a bill is not payment of it: that it is a mere continuation of the original debt; and although the one bill is given up to the party primarily liable upon it on his giving the renewal, that the original debt is still subsisting by means of the renewal, and all securities deposited with the original bill are still applicable to the renewal bill, although the original bill was given up.

The defendants contend that the note now sued upon was an accommodation note in point of fact, although the bank had not notice of it: that although the bank had a valid claim upon the note as security for payment of the note for \$200, because it was expressly given by McLagan for that purpose, and was given while the collateral was still current, but that it was applicable as a security to that particular note, and to no other; that it could not be used as security for the renewal note of \$175, because the note sued on—the collateral note—was then over due, and it could properly be inferred if it were an accommodation note that it should not be negotiated after its maturity; and it was proper in point of law so to infer, because the evidence here was that MacLagan should take up the collateral note when it fell due, which was equivalent to an agreement that McLagan should not negotiate that note after it was due.

The questions are :—

1. Was the note sued upon an accommodation note in fact?

That point was not argued before us, it being assumed by both parties that it was.

2. If an accommodation note, was the fact of McLagan allowing it to remain with the bank, who got it before its

maturity on the \$200 note, to apply upon the renewal of the \$200 note, at which time the collateral was overdue, a *negociation* of the collateral by McLagan, after its maturity ? or,

3. Was it a mere continuance of the original deposit and negotiation of it upon the note of \$200, or the debt which that note by the renewal of it represented ?

4. What is the effect of renewing and giving up the \$200 note ?

Does it extinguish the old note and debt, or is it merely a suspension of the remedy for the original debt until the renewal falls due ?

An accommodation note, I understand to be one, according to the language of pleading, which is made by the party giving the accommodation without value or consideration for the making or giving, or payment of the note.

The note in question was not one of that kind. Woodward, one of the makers of it, said the note " was given to McLagan to assist him to retire some of our paper on him that was coming due. \* \* He claimed he had a large amount of paper coming due at that time, and it was to assist him. Q. Your paper ? A. Yes, it was our paper he was complaining of ; he often had difficulty to get away with it."

The note was, therefore, given to pay off the debt or liability for which the defendants were liable, and which was about falling due, and there was no evidence to shew that it was not so applied by McLagan to the extent of the \$200 he raised upon it ; and I do not understand that to be an accommodation note.

I shall, however, dispose of the other questions, assuming it to be, as it was treated by the parties, an accommodation note.

Was the fact of McLagan allowing the note, properly left as a security for the \$200, to remain with the bank as a security for the renewal of \$175, at which latter time the collateral was overdue, a negociation of the note by McLagan after it was due ? That is, was the note sued

upon determined by the taking of the renewal, and the giving up to McLagan of the note for \$200?

The cases shew that a renewal note, until its dishonour, of which the creditor is holder, is conditional payment of the original note if the creditor retain possession also of the original note: *Griffiths v. Owen*, 13 M. & W. 58; *Belshaw v. Bush*, 11 C. B. 191; *Lumley v. Musgrove*, 4 B. N. C. 9; *Kendrick v. Lomax*, 2 Tyr. 438.

In *Byles on Bills*, 13th ed., 240, 391, and *Chalmers on Bills*, 2nd ed. 221, referring to some of these cases, it is stated that if the renewal bill be dishonoured, the creditor, if he have retained the original bill, may sue upon it, for his debt as the remedy is only suspended during the currency of the renewal, and the debt is not extinguished nor affected.

If the original bill be given up there can be no recourse to it simply because the creditor does not hold it. *It has been extinguished.*

If the giving of a renewal bill is conditional payment of the original bill, and the creditor on the dishonour of the renewal can sue on the original bill, which he must for that purpose of course retain in his possession, the giving up by him of the original bill should be evidence of an unconditional payment, or at any rate of there being a satisfaction and discharge of the original note, because there is no debt, or remedy at any rate, on the original note to revive or which can be revived: *Currie v. Misa*, L. R. 10 Ex at p. 163.

It is evidence, however, only of the original note being paid or satisfied and discharged. *Per Crompton and Wightman, JJ.*, in *Parr v. Jewell*, in 16 C. B., at page 706, in Ex. Ch.; *Sturtevant v. Ford*, 4 M. & G. 101. If so, such *prima facie* evidence of payment or satisfaction and discharge of the first note may be rebutted. As a fact the original note was not paid; and I think as there is evidence from which it may be inferred that the bank retained the collateral note sued on and no doubt required they should retain it, and as McLagan did leave it upon the renewal, that the



note was not paid or satisfied and discharged, nor the debt it represented satisfied and discharged, nor understood to have been so by these parties. If the bank had given McLagan cash over the counter on the original note, that cash, as money lent, could still be sued for, although a note was given for it which was afterwards given up. Now, the bank had an existing claim or debt against McLagan at the time he gave the original note and left the collateral note. The original note was to apply on a part of that debt. The collateral was to be applied to that part of the debt represented by the original note. That part of the debt is, with the exception of \$25, still due by McLagan, and is now represented by the renewal.

Why should not the collateral note still be applicable to that part of the debt ?

The defendants did not give the collateral to apply to the original note. They knew nothing of such a note. They gave it to apply upon their paper on which McLagan was liable, and who had to provide for it, and it was so applied ; for the proceeds of the \$200 note were credited by the bank against that falling due paper, and instead of McLagan giving his note for \$200. and leaving the note sued on as collateral, he could have discounted the collateral itself for its full amount, and applied the whole of it to meet the falling due paper of himself and of the defendants. and the question of collateral liability would not have arisen.

It is certainly a fact to be determined, (assuming the note sued on to be an accommodation note,) whether it was taken as collateral for the due payment of the note for \$200, or for that portion of McLagan's then existing debt which the note represented, and that has not been determined.

If it were in respect of the particular note—or paper for \$200—the plaintiffs should not recover on the note sued upon, because they have extinguished it; but if for the debt it represented they should recover, because the defendants gave it to apply against so much of that debt, and

not against the note for \$200, and it was applied in fact in that way by the bank. And McLagan's leaving the note with the bank, on the renewal, not on any new bargain, but apparently as part of the original transaction, shews the agreement was that the note sued on was to be a security for the *debt* of \$200, and not for the note it represented.

If the note sued on be applied to so much of the debt and not to the particular note, then clearly McLagan did not negotiate or use the note after its maturity, but used it long before it was due, and no subsequent user or negotiation of it has ever been made. In that view, the application of it to the renewal is a mere continuance of it for so much of the \$200, to which it was at first applied, and of which \$175 still remains unpaid.

The cases of *Millet v. Wood*, 24 La. Ann. 198, and *McNamara v. Condon*, 1 McArthur, 364, on that point, may be referred to as cited in 1 *Daniel on Negotiable Instruments*, 2nd ed., 179.

I think the note in question was not and cannot be considered to be an accommodation note.

It was made for the defendants' own purposes, as well as for the convenience of McLagan. As he could not take up the falling due notes they were bound to do so. It was McLagan who first of all made it a collateral note or security for the \$200, and with which arrangement he and the bank were alone concerned. The defendants had nothing to do with it, nor had they even knowledge of it; but I think the defendants are entitled to the benefit of its being used as a collateral note if McLagan expressly instructed its application to the \$200 note only, and not to the debt that note represented.

If the note is to be considered an accommodation note, I think further evidence should be taken to ascertain and determine more clearly whether the note sued upon was given in security for the payment of the \$200 note only, or for that part of the debt which McLagan owed to the bank which the \$200 note represented. It appears to me

it may be inferred to have been the fact that it was given for the debt, from the case as it now stands.

OSLER, J.—I think the proper inference to be drawn from the evidence is, that the note sued on was transferred to the plaintiffs as collateral security for the debt represented by the \$200 note. This debt was not discharged by the renewal of that note, it was merely suspended. The plaintiffs' title to the collateral note, which was acquired while it was negotiable, is not defeated by the renewal, even though the latter be treated as payment of the original note. There is nothing in the evidence as I read it to warrant the contention that the collateral note now sued on was given strictly with reference to the \$200 note as such so as to prevent the plaintiffs from dealing with that note or the debt represented by it as they pleased. I think the appeal should be allowed, with costs.

*Appeal allowed, with costs.*

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## DEVANNEY V. BROWNLEE ET AL.

*Promissory note—Accommodation maker—Principal and surety—  
Renewal—Discharge of surety.*

A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for \$1,200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands.

*Held*, [reversing the judgment of the Court below], that the married woman was a surety in respect of the note for her son; and that the authority to the son as to using the note did not extend to keeping it afloat after maturity without her knowledge; and that she had been discharged by the extension of the time of payment.

THIS action was brought by the plaintiff to recover the sum of \$400, with interest, on a promissory note for \$1,200. made by the defendants William H. Brownlee and Elizabeth Brownlee jointly, dated the 26th day of June, 1879, payable to the order of the plaintiff three months after the date thereof, on which was paid at various times the sum of \$800, in addition to several sums to satisfy accruing interest.

The defendant Elizabeth Brownlee pleaded several pleas, amongst others, the seventh, that she was at the time of the making of the said note and continued to be a married woman, the wife of one Henry Brownlee.

And for a defence on equitable grounds, stated that she became a joint and several maker of the said note as surety only for the defendant William H. Brownlee, of which the plaintiff was well aware, and after the said note became due the plaintiff, whilst he was holder thereof, did without the consent of the defendant Elizabeth Brownlee, and for a good and sufficient consideration in that behalf, agree with the defendant William H. Brownlee; to give and did give time for payment of the said note.

And for a further defence on equitable grounds, that the plaintiff indorsed for the accommodation of the defendant William H. Brownlee, a note for the sum of \$1,200, on or about the 25th day of June, 1879, and the defendant William H. Brownlee discounted the same at &c., on the

it may be inferred to have been the fact that it was given for the debt, from the case as it now stands.

OSLER, J.—I think the proper inference to be drawn from the evidence is, that the note sued on was transferred to the plaintiffs as collateral security for the debt represented by the \$200 note. This debt was not discharged by the renewal of that note, it was merely suspended. The plaintiffs' title to the collateral note, which was acquired while it was negotiable, is not defeated by the renewal, even though the latter be treated as payment of the original note. There is nothing in the evidence as I read it to warrant the contention that the collateral note now sued on was given strictly with reference to the \$200 note as such so as to prevent the plaintiffs from dealing with that note or the debt represented by it as they pleased. I think the appeal should be allowed, with costs.

*Appeal allowed, with costs.*

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## DEVANNEY V. BROWNLEE ET AL.

*Promissory note—Accommodation maker—Principal and surety—  
Renewal—Discharge of surety.*

A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for \$1,200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands.

*Held*, [reversing the judgment of the Court below], that the married woman was a surety in respect of the note for her son; and that the authority to the son as to using the note did not extend to keeping it afloat after maturity without her knowledge; and that she had been discharged by the extension of the time of payment.

THIS action was brought by the plaintiff to recover the sum of \$400, with interest, on a promissory note for \$1,200. made by the defendants William H. Brownlee and Elizabeth Brownlee jointly, dated the 26th day of June, 1879, payable to the order of the plaintiff three months after the date thereof, on which was paid at various times the sum of \$800, in addition to several sums to satisfy accruing interest.

The defendant Elizabeth Brownlee pleaded several pleas, amongst others, the seventh, that she was at the time of the making of the said note and continued to be a married woman, the wife of one Henry Brownlee.

And for a defence on equitable grounds, stated that she became a joint and several maker of the said note as surety only for the defendant William H. Brownlee, of which the plaintiff was well aware, and after the said note became due the plaintiff, whilst he was holder thereof, did without the consent of the defendant Elizabeth Brownlee, and for a good and sufficient consideration in that behalf, agree with the defendant William H. Brownlee; to give and did give time for payment of the said note.

And for a further defence on equitable grounds, that the plaintiff indorsed for the accommodation of the defendant William H. Brownlee, a note for the sum of \$1,200, on or about the 25th day of June, 1879, and the defendant William H. Brownlee discounted the same at &c., on the

26th day of June, 1879. That the defendant Elizabeth Brownlee, became a joint and several maker with the defendant William H. Brownlee, of the promissory note in the plaintiff's declaration mentioned, as surety only for the defendant William H. Brownlee, of which the plaintiff was well aware, and the said note in the plaintiff's declaration mentioned was transferred to the plaintiff and was always held by him as security for and to indemnify him against his indorsing the said note, so held &c., and there never was any other value or consideration for the making of the same ; and the plaintiff whilst he was the holder of the said note in the plaintiff's declaration mentioned, and the defendant William H. Brownlee, did agree that he the defendant William H. Brownlee, should pay to the holders of the said note of \$1,200 so discounted with and held by them after the latter note had matured, and after it became over due, the sum of \$800, part and parcel of the amount then due thereon to the holders ; and the defendant William H. Brownlee did accordingly pay the holders of the said note so made by the defendant William H. Brownlee and indorsed by the plaintiff for the accommodation of the said William H. Brownlee, the said sum of \$800, and the same was renewed for a further period of three months, the defendant William H. Brownlee making the said renewal notes and the plaintiff indorsing the same for the accommodation of the said William H. Brownlee and the said William H. Brownlee paying the discount on such renewals to the said bank, and the same was afterwards renewed from time to time till shortly before the commencement of this suit, the defendant William H. Brownlee paying the discount and making each of the said several notes and the plaintiff indorsing each renewal note for the accommodation of the defendant William H. Brownlee, all of which was done without the consent or knowledge of the defendant Elizabeth Brownlee ; and the plaintiff well knowing that the defendant Elizabeth Brownlee became a joint and several maker of the note in the plaintiff's declaration mentioned only as surety for the

defendant William H. Brownlee, and for no other purpose, and receiving no value or consideration for the making of the same.

The plaintiff joined issue on all the pleas of the defendants. And for a further replication to the said seventh plea stated that at the time of the making of the said note, the said Elizabeth Brownlee was the owner of real and personal estate in her own right, and liable for her separate debts and contracts; and the said plaintiff accepted and received the said note from the said defendant relying solely on the fact that she was the owner of such separate estate.

The cause came on to be tried before Morrison, J. A., at St. Catharines, when the depositions taken before trial were agreed to be used as evidence.

John Devanney, the plaintiff swore "I have known W. H. Brownlee for a number of years. He has indorsed my notes for my accommodation several times, and I have done the same with Brownlee. I got the note sued on from W. H. Brownlee. Before this, he had gotten my note. I never asked for security. I met Brownlee on the street, and I said, 'You must be a nice man to do what you did with me yesterday,' and, without replying, he pulled this note out of his pocket, and said it would be all right. The note was filled up and stamped as it is now. \* \* The note that I had made for him became due a few days before this became due. There was another note given, in its place, for \$400 or \$800. I cannot say whether it was renewed two or three times, and reduced to \$400. Brownlee paid the \$800. Mrs. Brownlee was the security for the debt."

Elizabeth Brownlee, swore. \* \* "I first learned of the transactions between Mr. Devanney and my son in the spring of 1880. Devanney came to my house, and asked me if I knew that I was on a note. I said no; but I knew I had signed a note, but did not know who held it, and I did not know for what amount, nor for what purpose it was signed. I gave my son the note, to be used as he liked. He never told me for what purpose he used the note, and I did not ask him. I could not say what he was going to do with the note. I think I had signed two or three times before that. I had no idea that this note was



given as collateral for anything. I thought my son would take care of the note. I knew I had nothing to pay the note with at that time. At the time I signed this, I owned the house I now live in, and the small white house adjoining. I owned the property spoken of some time before I signed that note. I still continue to own the same property. The property I then owned and still own is worth \$6000. My husband was alive at the time I signed this note. He did not know that I signed the note. I kept those transactions about the notes to myself. My husband was childish and sick at that time and in bed the most of the time. I did not own any personal property at that time. When Mr. Devanney spoke to me I remembered that I had signed something which I supposed was a note. But I did not know what it was. I remember that I put my name on the face of the other notes that I have spoken of. I never spoke to my son about what Devanney had told me. I never spoke to him about it until after I was served with the summons in this case. He did not explain to me how Devanney got the note. \* \* I did not know whether that note was to be discounted by my son or what was to be done with it when I signed it; it was in blank when I signed. I cannot say whether my son's name was on the note when I signed it or not. I have no recollection of what month I signed this note; but I know it was in the spring. It was not as late as June when I signed it. The note was filled up then. I did not get anything for giving the note. I got the property I have spoken of from my husband by deed. \* \* The consideration for getting the deed of property spoken of was releasing my dower in the balance of my husband's property."

The defendant William H. Brownlee, swore, "I signed note marked exhibit ("A") in examination of my co-defendant Elizabeth Brownlee. \* \* I think my mother signed this note on or about the 26th June, 1879. It was signed in blank by her. I did not tell her for what purpose I was going to use it, and she never knew for what purpose I used it. She had signed several notes for me at that time, which were made payable to my order, and I got them discounted at the Bank of Toronto. I knew my mother was good at the time I got her to sign this note. I never told her about this note up to the time she was sued. Mr. Devanney told her.

"I gave him this note for collateral security for a note made by Devanney, which I had discounted for my accom-

modation. I do not know where that note is now. The amount of that note was \$1200, which Devannev made for my accommodation some few days before that. I cannot say that Devannev asked me for that note. He asked me for security, but I do not know why he asked me for security. I will not swear that the note was not signed by my mother before Devannev asked me for security. My mother did not know that the note was going to Devannev. I never told her that it was held as collateral. I intended Devannev to hold that note until I had cleared him out of the bank on that other note. I have cleared him all except \$400. That is the whole amount due on the original transaction. \* \* I knew all along that he held this note indorsed by my mother. Now I never asked him for it. I have never paid Devannev any money for renewing. I suppose the reason I did not ask Devannev for this note after the first renewal is because I intended him to hold this note until the whole was paid. I would not expect him to give up this note sued on when the note held by the bank was renewed. I think Devannev cannot read."

The deed by which the appellant acquired the lands and premises referred to in her depositions bore date 17th May, 1877,

*Rykert*, for the plaintiff.

*McClive*, for the defendant.

After taking time to look into authorities.

MORRISON, J. A.—In this case it was contended by counsel for the defendant Elizabeth Brownlee that she was not liable in this action, as she was a married woman at the time she made the note, viz., in June, 1879. She was married in 1840, and her husband died in July, 1880. It was admitted she had, at the time, considerable property in her own right, as I held during the trial. I can see no force in the objection urged in that respect. It was, however, also contended that if she was liable at any time, that being a mere surety she was discharged, owing to the plaintiff being a consenting party to the making of two renewals of a note made for \$1200, at three months'

date, made by the defendant W. H. Brownlee, to the plaintiff for the defendant's accommodation. As to this defence, it appears from the examination of the parties, which was the only evidence given at the trial, that the plaintiff had jointly signed a note for the accommodation of the male defendant, Brownlee, who is a son of the defendant Elizabeth, for \$275; that the defendant William, afterwards saw plaintiff, and said that he ought to have been an indorser, and that he then indorsed a new note; that he afterwards, within three days, had heard he had discounted a note for \$1200, and did not return to him the \$275 note: that he saw the defendant William, and charged him with having obtained the note improperly, when the defendant took out of his pocket the note now in suit, and handed it to the plaintiff as a security that the paper in the bank, including the \$1200, would all be paid. It appears that on this \$1200 note, when it fell due, the defendant William paid \$800, and the bank renewed it for \$400 twice, and the defendant William not retiring the \$400 note, the plaintiff had to pay it, and now sues for the amount he had to pay, and interest, \$470. The note sued on the female defendant says she signed for her son, and gave it to him (as she was in the habit of doing) to do what he liked with it, and to use it for any purpose he thought proper: that she knew nothing of the transactions between the plaintiff and her son; did not know what use he made of it; never knew until action who the holder was, or that it was ever used as collateral security for any purpose whatever. Under these circumstances, I think the plaintiff is entitled to recover for the amount claimed, \$470. I therefore give judgment in favor of the plaintiff for the amount, with full costs."

From this judgment, the defendant Elizabeth Brownlee appealed on the grounds, (1) that at the time she signed the said promissory note as joint maker with W. H. Brownlee she had not any separate estate within the meaning of the Married Woman's Property Act, nor could she under the facts of this case bind such property by becom-

ing a party to such note, (2) that the judgment of the learned Judge should not have been a general one against the appellant, but should have been confined to the separate estate (if any) liable in law for her separate contracts, and which separate estate or property was still her property, (3) that the learned Judge should have found the appellant not liable on the note sued on, as the facts shew that the respondent Devannev gave time to the respondent William H. Brownlee for a valuable consideration on the debt represented by said note and renewals referred to in the evidence, for which the note sued on was held as collateral security, when he well knew that the respondent William H. Brownlee was the principal debtor, and that the appellant was merely a surety for the respondent William H. Brownlee; and that the liability of the appellant was not enlarged because she did not know of the dealings of the respondents respecting the note and renewals of the same for which the note sued on was held as collateral security; and (4) that the rights of the appellant as surety were the same as if she knew of but did not assent to or concur in the extension of time, for a valuable consideration, given by the respondent Devannev to the respondent William H. Brownlee the principal debtor, she having been with the knowledge of all parties merely a surety.

The appeal came on for argument before this Court on the 8th of September, 1882.\*

*McClive*, for the appellant. It is established in evidence that the appellant married on the 20th day of February, 1840, and remained the wife of Henry Brownlee till after the writ of summons was issued, and that the appellant became a joint maker of the promissory note sued on in this action on the 26th day of June, 1879, while she was the wife of the said Henry Brownlee, and after the R. S. O. came into force. It also appears that she had

\**Present*.—SPENCER C. J. G. BROWN, PATTERSON, J. A., and CAMERON, J.

no personal property, nor any real estate, save that conveyed to her on the 17th day of May, 1877, and such real estate was not at the time she became a joint maker of said note, her separate estate within the meaning of the married woman's property act, nor could she, under the facts appearing herein, bind the same by becoming a party to such promissory note. Under any circumstances, the judgment of the learned Judge should not have been a general one against the appellant, but should have confined any execution of the plaintiff to the separate estate (if any) liable in law for her separate contracts, and which separate estate or property was still her property; and the liability of the appellant was not enlarged because she did not know of the dealings of the respondents respecting the note and renewals of the same for which the note sued on was held as collateral security; her rights as surety being the same as if she knew of but did not assent to, or concur in the extension of time given by Devanney to William H. Brownlee the principal debtor, she being, with the knowledge of all parties, merely a surety. He referred to *Dingmam v. Austin*, 33 U. C. R. 190; *McCready v. Higgins et al.*, 24 C. P. 233; *Lawson v. Laidlaw et ux*, 3 A. R. 77; *Field v. McArthur*, 27 C. P. 15; *Stone v. Knapp*, 29 C. P. 605; *Adams v. Loomis*, 22 Gr. 99, S. C. 24 Gr. 242; *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Canniff v. Bogart*, 6 C. P. 474; *Polack v. Everett*, 1 Q. B. D. 669; R. S. O. ch. 125, secs. 2, 3 & 4.

*Bethune*, Q. C., for the respondent, contended that it was immaterial whether the appellant was married or not at the time the action was commenced, inasmuch as the note sued on was an engagement or debt contracted by her in respect to her separate estate, and was accepted and received by the respondent relying wholly on the fact that she was possessed of separate estate; and that the pleas on which the appellant relies do not set out or shew there was any binding agreement on the part of the respondent to give time for the payment of the note or notes held by the bank, for which the note sued on was held as collateral

security. That the fact of Elizabeth Brownlee having separate estate at the time of her making the note sued on, and the respondent Devannev having accepted the note, relying upon her having such separate estate, was sufficient to enable him to recover in this action. He also submitted that Elizabeth Brownlee having acquired separate estate at the time mentioned, and being the owner of it at the time the contract was entered into, it was immaterial whether her husband was alive or not. If however, the Court should be of opinion that the judgment rendered by the learned Judge was a proper one so far as the appellant was concerned, but that the same was not properly rendered, then he asked that the same should be ordered to be amended so as to enable the respondent to have a remedy against the real estate of the said appellant. Here the evidence is distinct that the note in question was made by the appellant to be used by her co-defendant in such manner as he thought fit, and that the note was delivered by her co-defendant to the respondent to be held by him until the whole indebtedness for which the respondent was liable for the said co-defendant was removed from the bank — citing, *Kerr v. Stripp et al*, 40 U. C. R. 125; *Wagner v. Jefferson*, 37 U. C. R. 551; *Lawson v. Laidlaw*, 3 A. R. 77; *Frazee v. McFarland*, 43 U. C. R. 281; *Merrick v. Sherwood*, 22 C. P. 467; *Turner v. Johnson*, 7 Jur. N. S. 273; *McCreedy v. Higgins*, 24 C. P. 237; *Steels v. Hullman*, 33 U. C. R. 471; *Griffin v. Patterson*, 45 U. C. R. 536; *Thompson v. McDonald*, 17 U. C. R. 304, R. S. O. ch. 125, sec. 20.

February 6, 1883. SPRAGGE, C. J. O.—There are two questions in this case, one a rather nice question, as to the separate property of a married woman, in a case of a conveyance direct from her husband to her of real property, and whether in such case, by such conveyance he divests himself of his tenancy by the curtesy.

The other question is, whether the note to which she was a party with her son, the co-defendant, was given by

her as surety for the accommodation of her son, which I think admits of no doubt; and whether it was so to the knowledge of the plaintiff, as to which the evidence was in her favour. And if such be her position, whether she was discharged by time being given by the plaintiff to the principal debtor. The note was signed by her in blank and given to her son, she says, "to be used as he liked." She did not know for what purpose her son would use it, but thought that he would take care of it. It was filled up by the son, dated 26th of June, 1879, for \$1200, payable in three months, and was handed signed by the son and his mother to the plaintiff, who does not appear to have been told of the circumstances under which it was signed. It was renewed twice, each time for three months, upon payment by the son to the plaintiff of \$400, the original note remaining in the hands of the plaintiff. The mother was not a party to the renewals. The plaintiff's position is that the defendant Elizabeth giving the note to her son, as she did, enabled him to make what use of it he pleased, and that its being given to the plaintiff by the son as it was, the son telling him, as he says, "to hold that note until he cleared me in the bank," he thus had authority from Elizabeth derived through her son to give time to him for payment without discharging her from her suretyship.

Upon the evidence it cannot be said that the learned Judge was not right in holding that the note was given to the plaintiff in the way, and accompanied with the words spoken to by the plaintiff. The question remains whether the giving the note by Elizabeth to her son to be used as he liked, gave him authority to make the use of it that he did.

It appears from her evidence that she contemplated his using it to raise money upon it by discount, or it might be pledging it, or otherwise using it as security. Did what she said convey authority to use it otherwise than in one of the modes in which a promissory note may be used; to use it in a way which would deprive her of her ordinary right as a surety? The plaintiff was not misled by any

thing that she said, for it does not appear that what she said to her son was communicated to him; and William H. Brownlee the son says he thinks the plaintiff cannot read. He probably assumed that William H. Brownlee might without special authority leave the note with him after it became due until it was fully paid.

Every thing turns upon the extent of the authority given by the mother to the son when she signed the note. If the transaction had occurred between persons conversant with business, for instance a man of fair education and business habits putting his name to a note in blank, or filled up for the accommodation of his friend and telling him he might use it as he liked, I apprehend that no more would be meant or understood between them than that the friend might raise money upon it, or use it as security, not that he might agree to keep it afloat after its maturity for an indefinite period, without his consent or knowledge using it for a purpose outside of its character as a promissory note. And if such would be the interpretation put upon what might pass between such persons, I see no reason for interpreting differently what passed between Elizabeth Brownlee and her son.

BURTON, PATTERSON, J.J.A., and CAMERON, J., concurred.

*Appeal allowed, with costs.*

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## DRISCOLL V. GREEN ET AL.

*Chattel mortgage—Affidavit of debt.*

In November, 1881, a chattel mortgage was made to secure the plaintiff as indorser of a promissory note of the mortgagor, dated 4th October, 1881, at two months. A recital in the instrument stated that it had been given "as security to the mortgagee against his indorsement of said note, or any renewal thereof that shall not extend the liability of the mortgagee beyond one year from the date thereof; and against any loss that may be sustained by him by reason of such indorsement of said note, or any renewal thereof." The affidavit stated it was made "for the express purpose of securing the mortgagee against the payment of such his liability for the said mortgagor by reason of the promissory note therein recited or any future note or notes which he may indorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise."

*Held*, [reversing the judgment of the Court below,] that as the mortgage itself was good, and the affidavit covered all that is required by the Act, that part of the affidavit from "or any future note" to the end was unnecessary, and could not vitiate the security.

*Keough v. Price*, 27 C. P. 309, remarked upon.

THIS was an appeal from the judgment of the County Court of the county of Bruce, making absolute a rule *nisi* obtained to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendants.

The proceeding was an interpleader issue, to determine the ownership of certain goods seized by the sheriff of the county of Bruce, under writs of *feri facias*, dated respectively the 27th of January, and 9th of February, 1882, sued out by the defendants John Green & Co., against the goods of William McCracken, and claimed by the plaintiff John William Driscoll as mortgagee under a chattel mortgage, dated 22nd November, 1881, and filed on the 24th of the same month.

The cause came on to be tried before the Judge, without a jury, when the plaintiff was examined on his own behalf, and proved his obtaining the mortgage from McCracken, and the object thereof, which was recited in the mortgage as follows, "Whereas, the said mortgagee, at the request of the mortgagor, and for his accommodation, has indorsed a certain promissory note of the said mortgagor for two hundred dollars, upon the agreement that the mortgagor

should execute and deliver these presents as security to the mortgagee against his indorsement of said note, or any renewal thereof that shall not extend the liability of the mortgagee beyond one year from the date hereof, and against any loss" that may be sustained by him by reason of the indorsement of said note or any renewal thereof

\* \* setting forth a copy of the note.

The mortgagee (Driscoll) made an affidavit of *bona fides* filed with the mortgage setting forth that the "mortgage truly sets forth the agreement entered into between J. W. Driscoll and the said mortgagor therein named, and truly states the extent of the liability intended to be created by such agreement, and covered by such mortgage, and that the same was executed in good faith for the express purpose of securing the said mortgagee therein named against the payment of the amount of such his liability for the said mortgagor by reason of the said promissory note therein recited, or any future note or notes which he may indorse for the accommodation of the said mortgagor, whether as renewals of the said recited promissory note or otherwise," and not for the purpose of securing the goods &c., against the creditors of McCracken.

The learned Judge of the County Court found in favour of the claimant (Driscoll). In the October Term following, the defendants moved for and obtained a rule *nisi* to set aside the judgment entered for the plaintiff and to enter judgment for the defendants: or for a new trial on the grounds following:

"1. That the chattel mortgage under which the plaintiff claims is invalid, in that it does not restrict the liability incurred by the plaintiff therein to the note therein recited, and all renewals thereof to mature within one year from the date of the said mortgage.

"2. The said mortgage is invalid in that the affidavit of *bona fides* does not state the amount of the liability of the plaintiff intended to be created by the said mortgage, and does not shew that the said liabilities were limited to the period of one year.

"3. The said mortgage is invalid in that the goods therein mentioned are not sufficiently described.

"4. That the verdict is against the evidence and the weight of evidence."

This rule was made absolute, and the plaintiff thereupon appealed to this Court on the following, amongst other grounds :

" 1. That the chattel mortgage does set forth fully the terms, nature and effect of the agreement, and the amount of liability intended to be created.

" 2. That the affidavit of the mortgagee also truly sets forth the agreement entered into between the parties to the chattel mortgage, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, as required by the Chattel Mortgage Act, Revised Statutes of Ontario ch. 119.

" 3. That the said affidavit must be read in the light of the mortgage to which it refers, and being so read, it clearly shews that the liability intended to be created did not extend beyond one year.

" 4. That said affidavit states sufficient to satisfy the statute, and the part of such affidavit set forth in the alternative may be treated as surplusage."

The appeal came on to be argued before this Court on the 9th day of February, 1883\*.

*H. J. Scott*, for the appellant.

*Gibbons*, for the respondents.

The authorities cited are mentioned in the judgment.

June 29, 1883. SPRAGGE, C. J. O.—This is an interpleader issue, and the question is, whether the chattel mortgage given to the plaintiff by the execution debtor is good, under sec. 6 of ch. 119 of the R. S. O.

The date of the mortgage is 23rd November, 1881. On 4th October, 1881, the debtor had given to the plaintiff his promissory note for \$200, payable two months after date. The mortgage recites that the mortgagee had indorsed this note, at the request of the mortgagor, and for his accommodation, upon the agreement that the mor

\**Present*, SPRAGGE, C.J.O., BURTON, and PATTERSON, JJ. A.

gagor should execute and deliver the mortgage, "as security to the mortgagee against his indorsement of said note, or any renewal thereof that shall not extend the liability of the said mortgagee beyond one year from the date hereof, and against any loss that may be sustained by him by reason of such indorsement of said note, or any renewal thereof."

The part of sec. 6 that applies to this case is as follows: "In case of a mortgage of goods and chattels for securing the mortgagee against the indorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor, not extending for a longer period than one year from the date of such mortgage, and in case the mortgage is executed in good faith, and sets forth fully by recital or otherwise, the terms, nature, and effect of the agreement, and the amount of liability intended to be created, and in case such mortgage is accompanied by the affidavit of a witness thereto, of the due execution thereof, and by the affidavit of the mortgagee \* \* stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability intended to be created by such agreement, and covered by such mortgage, and that such mortgage is executed in good faith, and for the express purpose of securing the mortgagee \* \* against the payment of the amount of his liability for the mortgagor."

follow other clauses upon which nothing turns; and the section concludes by enacting that if such mortgage be registered, it shall be valid and binding.

The affidavit made in this case varies from the language of the statute in saying that the mortgage was made "for the express purpose of securing the mortgagee against the payment of the amount of such his liability for the said mortgagor by reason of the promissory note therein recited or any future note or notes which he may indorse for the accommodation of the mortgagor, whether as renewals of the said promissory note or otherwise."

I cannot but remark that a great deal of litigation arises

out of the want of care of solicitors and others acting as conveyancers, in deviating without reason from the forms given for their guidance in various statutes, and not observing the construction put upon statutes by the Courts. If in this case the statute had been followed as it probably would have been if the cases in our Courts, *Keough v. Price*, 27 C. P. 309, and *Ontario Bank v. Wilson*, 43 U. C. R. 406, had been carefully noted, the litigation that has grown out of this transaction could scarcely have arisen.

The cases to which I have just referred differ from the case before us in this, that in the cases cited it did not appear that the liability by indorsement or otherwise for securing the mortgagee against which the mortgage was made was limited to one year from the date of the mortgage, while in the case in judgment it does so appear by the recital; and that is one of the modes pointed out by the statute. The proviso is silent as to the limitation of time, but avers that the mortgagor shall pay the note which had been recited "the said note and renewals thereof." Reading the recital and proviso together the same limitation of time would, I apprehend, apply to both. Then follows the covenant of the mortgagor to pay the promissory note then current, "and all future and other promissory notes which the said mortgagee shall hereafter indorse for the accommodation of the said mortgagor," not saying by way of renewal or containing any limitation as to time.

If this covenant were strictly a part of the mortgage, as a security upon chattel property, it would be open also to the further objection that it does not set forth fully as required by the statute "the amount of liability intended to be created;" but the covenant is only personal and does not affect the chattel property mortgaged.

Next we have the affidavit, which follows the statute with the exception I have stated. It says the mortgage truly sets forth the agreement between the parties and truly states the extent of the liability intended to be created by such agreement, and that the same was executed

- in good faith and for the express purpose of securing the mortgagee against the payment of the amount of such his liability for the said mortgagor by "reason of the said promissory note therein recited." If the affidavit had stopped there, or if it had been added "or any future note or notes which he may so indorse as not to extend his liability beyond one year from the date of the mortgage," it would not, I think, have offended against the statute; but when it goes on to say "whether as renewals of the said note or otherwise," it is not in accordance with the statute.

The affidavit thus states that the express purpose of the mortgage was to secure that for which the mortgage might properly be made within the statute, and beyond that to secure that for which the mortgage could not properly be made within the statute, and we see, I think, upon examining the mortgage, that it is effectual only to secure that for which it could properly be made. It comes then to this, whether the affidavit stating that it was made for this further purpose not authorized by the statute vitiates the instrument; the affidavit stating all that the statute requires to be stated, but stating also this something more.

We must take it to be true that the mortgage was made for the express improper purpose, as well as for the proper purpose, not that any fraud was intended, or any wrong; but the parties intended to create a security which the law does not permit as against creditors. Should that purpose disclosed by the affidavit, together with the fact of the affidavit being in the shape that it is, vitiate an instrument that is otherwise within the protection of the statute?

I have, I confess, hesitated a good deal, as to how this question should be answered. I incline to the opinion that the mortgage itself being good, and the affidavit covering all that is required by the statute, the mortgage is not avoided; and upon further consideration and conferring with my learned brothers upon the point, we all agree that that is the proper conclusion.

The judgment will therefore be to allow the appeal, and with costs.

BURTON, J. A.—The 6th section of the Bills of Sale Act deals with two classes of cases not to be found in the original Acts; the first, where an agreement in writing exists *for future advances* to enable the borrower to enter into and carry on business, and the second, to a mortgage for the purpose of securing the mortgagee against the indorsement of any bills or notes, or any other liability by him *incurred* for the mortgagor.

The time for the repayment of the advances contemplated under such an agreement is limited to one year from *the making of the agreement*.

In the case of indorsements or other liability under the second head, the liability so incurred is not to extend beyond one year from the date of the mortgage, but when the section proceeds to describe what the mortgage shall set forth, some confusion is created by dealing with the two classes of security together. The language of the section is: "And in case the mortgage is executed in good faith, and sets forth fully by recital or otherwise *the terms, nature, and effect of the agreement, and the amount of liability intended to be created*," language very appropriate to an agreement for future advances, but having little application to a case where the liability has been already created by the indorsement, and is not to be created by future advances.

For instance, in the present case, if the security had been taken to indemnify the mortgagee for his indorsement of the \$200 note pure and simple, nothing being said or contemplated as to renewals, what agreement is there to be set out, and how is any liability to be created? It is already created, and the mortgage is given simply to indemnify against that liability already incurred.

The agreement here between the parties as recited is, that the indorsement was made upon the agreement that the mortgage should be given as security against that indorsement, and that it should extend to any renewal

thereof that should not extend the liability of the mortgagee beyond one year from the date of the mortgage.

Whatever therefore may be the true meaning of that section, the mortgage so far appears to be in strict conformity with it, and I do not think that even if the words in the proviso or covenant can be held to extend to any renewal beyond the period of a year, instead of to any such renewal as is contemplated in the recital, that that can affect the validity of the mortgage. All that can be said is, that if any such renewals were made payable at a date subsequent to the year, the mortgage as against creditors would not cover it.

But it is necessary to the validity of such a mortgage that it should be accompanied by an affidavit of the mortgagee stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability intended to be created by such agreement, and covered by such mortgage, and is executed in good faith, &c. It is difficult, as I have already remarked, to understand how such an affidavit can apply to such a state of things as exist when a mortgage is given to indemnify an indorser against an indorsement already existing. But however that may be, the mortgagee has made such an affidavit strictly in the terms of the statute, except that he has added these words "or any future note or notes which he may indorse for the accommodation of the mortgagor, whether as renewals of the said recited promissory note or otherwise."

I feel very great difficulty in saying that such an addition to the affidavit can have the effect of avoiding the deed if good otherwise. The maxim "*utile per inutile non vitiatur*," ought, I think, to apply.

There is no agreement here that the mortgagee shall incur any future liability, even if the statute is intended to comprehend such a case, and is not confined to cases where the liability by indorsement or otherwise has been already incurred; The effect of the recital, I take to be nothing more than this, if the note mentioned in this



mortgage shall be renewed for any period less than a year, such renewal shall not be regarded as payment or an extinguishment of the security, but the security shall still enure for the benefit of the indorser until his liability is removed.

In *Keough v. Price*, 27 C. P. 309, the covenant was very similar in terms to that in the present mortgage, and it seems to have been the opinion of the Court in that case that the mortgage was on its face invalid on that account, it appearing that the mortgage was intended as a security or indemnity against a liability which might extend beyond the year. I am unable to understand why the security might not stand for the indorsements of those notes which would fall due within the year, and be void as to the others.

In the present case the mortgage was given to indemnify the indorser against the payment of the note set forth in the mortgage, or any renewal of it falling due within the year; it was renewed once for a period within the year, and the indorser had to pay it.

I can well understand that a mortgage given to indemnify a party against any indorsements which, within that period, he might be requested to give, and should give, would not come within the statute; but I can see no objection to a security given for a past indorsement being made by the very terms of the instrument to apply to any renewals of that paper so long as it did not extend beyond the year.

The stipulation that the security should extend to any future note or notes which the plaintiff might indorse, whether as renewals of the particular note or otherwise, was, as regards creditors, simply nugatory, but I do not think it could vitiate the security altogether. It is a misapplication of terms to call it an agreement creating a liability. It was simply a stipulation good *inter partes*, that the security should extend to such indorsements if the plaintiff chose to indorse any such notes.

I can understand the learned Judge feeling pressed by the decisions referred to in his judgment, but for the

reasons I have given I think the security in this case not open to objection. I agree, therefore, that the appeal should be allowed and the rule below discharged, and a judgment entered in favour of the claimant, with costs.

PATTERSON, J. A., concurred.

*Appeal allowed, with costs.*

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## QUINLAN v. THE UNION FIRE INSURANCE COMPANY.

*Insurance—Statutory conditions—Variations—Buildings within 100 feet—Failure to give notice—Diagram by agent after personal inspection—Evidence—Interest—Judgment nunc pro tunc—Unnecessarily long pleadings.*

The first statutory condition indorsed on a policy provided that if the insured misdescribed his buildings or goods to the prejudice of the company, or misrepresented, or omitted to communicate any material circumstance, the insurance relating thereto should be void. The second statutory condition provided that the policy was intended to be in accordance with the application unless the company should point out the difference relied on, with a variation added thereto, that such application, or any survey, plan or description of the property to be insured should be considered a part of the policy and every part of it a warranty by the insured, but that the company would not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. The twentieth statutory condition as varied, provided that in case any agent of the company took part in the preparation of the application, he should, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant. By the application, which was signed, not by the insured in person, but through the agent of the company, the insured was required to make known the existence of all buildings within 100 feet of the insured premises; and it appeared that the insured had omitted to make known the existence of a small building used for storing coal oil, and material to be made known, within such distance, but of the existence of which the applicant was not at the time aware. A diagram was made and filled in by the agent and signed by him in his own name as well as that of the applicant, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection and the knowledge thereby acquired, as also an intimate knowledge of the property, which he passed three times each day, and the agent at the foot of the application stated that he had made a personal survey of the risk.

*Held*, [reversing the judgment of the Court below, 31 C. P. 618] that under the conditions and circumstances above set forth the insured was relieved from the effect of his omission to make known the existence of such coal oil shed: that the inspection by the agent need not be one made for the purpose of such insurance, provided a personal inspection did take place; and that under the facts and circumstances appearing in the case the company could not dispute the correctness of the answers given by the insured, whether his answers upon the application for insurance were to be treated as warranties or representations only.

The 43rd section of the Court of Appeal Act, which provides "when on an appeal against a judgment in any action, personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the Court below is in favour of the defendant, and is reversed on appeal. In such case the Court, on reversing the judgment, gave liberty to the appellant, the plaintiff in the Court below, to move to be at liberty

to enter judgment as directed by this Court, *nunc pro tunc*, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favour.

When upon the argument of an appeal, the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the Court refused to wade through the mass of pleading which had been filed in the Court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of the Court below upon such pleading.

The unnecessary and improper length of pleadings remarked upon.

THIS was an appeal by the plaintiff from the judgment of the Court of Common Pleas setting aside a verdict found by Patterson, J. A., in favour of the plaintiff for \$910.14, for loss sustained by fire originating in a small shed adjoining the premises insured by the plaintiff, in which coal oil was kept, and which had not been mentioned in the application for insurance, or shewn on the plan or diagram accompanying the same. The case is reported in 31 C. P. 618, where the facts and pleadings, as also the judgment of the learned Judge at the trial, are fully set forth.

The appeal came on to be argued before this Court on the 16th and 17th of November, 1881. \*

The reasons assigned by the appellant, amongst others, were (1) That the application for insurance was shewn by the evidence to have been filled up and signed by Lodge, the Agent of the respondents, at Port Hope, and the answers to question 7 contained in the application, upon which the defence of the respondents turned, must be taken to have been the act of the respondents (2) That Lodge, the Agent of the respondents at Port Hope, was entrusted by the respondents with the power of effecting the insurance, not merely by interim contract but also by policy. (3) That the policies upon the face thereof provide that they should not be valid until countersigned by Lodge. That the Company, after having the policies filled up, sent them to Lodge to be countersigned by him and delivered, and he did so countersign and deliver them. Lodge, therefore,

\* *Present.*—SPRAGGE, C.J.O., BURTON, MORRISON, JJ.A., and ARMOUR, J.

is to be regarded for all purposes connected with the insurance as a general Agent. (4) That Lodge knew of the existence of this coal oil shed and other buildings which form the subject of discussion in the judgment appealed from, and Lodge's knowledge was the knowledge of the respondents. (5) That upon the evidence it was quite clear that the appellant had no knowledge of the existence of the coal oil shed or of the purpose for which it was used, and the appellant had no knowledge of the way in which the diagram on the back of the application had been filled up by Lodge. (6) That by the terms of the policy the Company took upon themselves the risk of the correctness of the diagram in question, prepared by Lodge from a personal inspection. (7) That according to the terms of the contract the words "survey," "plan," "description" are synonymous, and it is clear that the object of preparing the diagram was to shew exposures. The superscription of the diagram is headed "exposures." "Agents will describe all buildings within one hundred feet or endangering this risk, &c.," and the question number 7 in the application is connected with the words "external exposures," "what is the distance, occupation, and material of all buildings within one hundred feet." The Company assumed that Lodge had made a personal inspection of the risk and had prepared his diagram from such personal inspection, and their contract was based upon such assumption. The appellant was acting upon the belief that there had been a personal inspection by Lodge, and if he were assumed to have thought anything about the matter it was fair to suppose that he thought that the diagram had been prepared by him from such personal inspection; and it was submitted, therefore, that the Company were not at liberty to dispute the fact of such personal inspection and the preparation of the diagram from it. (8) That even if the Company were at liberty to dispute such personal inspection and preparation of the diagram, it ought to be found as a fact that there was a personal inspection and a preparation of the diagram from it. (9)

That the interim contract having been made by Lodge, who knew as much about the buildings contiguous to the risk as the appellant knew, the respondents were bound during the continuance of the interim contract, for the reasons set forth by the Court in the case of *Billington v. The Provincial Insurance Company*, 2 A. R. 158, and inasmuch as the respondents entrusted Lodge with the final completion and delivery of the policy, for the same reason the Company were bound under the policy by his knowledge. (10) That the Company were estopped by the diagram from disputing the accuracy of the answers to question number 7 in the application. (11) That the misstatement, if any there was, to the Company having been one which was due to the want of care of the Company's Agent, the Company should bear the loss consequent thereon, if any such there was. (12) That under the variations of the first statutory condition the appellant ought to have recovered, because he did not cause the buildings to be described otherwise than as they really were, nor did he knowingly permit the same to be thus described. (13) That the appellant had a right to take advantage of that part of the variation to the statutory condition which throws upon the Company the responsibility for the accuracy of the diagram in the case provided for, without also adopting the other part of the condition which makes the statements in the application warranties; because in fact the two subject matters were divisible, and ought to be held in this case to be divisible. (14) That even if the statements in answer to question number 7 be regarded as a warranty, the respondents were estopped from denying the accuracy of those statements, and so in that view it is immaterial whether the statements should be regarded as warranties or not. (15) That the judgment appealed from proceeded upon the ground that Lodge was to be regarded as the agent of the appellant and not as the agent of the respondents in the filling up of the application. This, however, the appellant contended was erroneous; as in the filling up of the application as well as in the preparation of the

diagram, Lodge was to be regarded as the agent of the respondents. (16) That even if in the filling up of the application Lodge could be regarded as the agent of the appellant for other matters, in so far as the answer to question number 7 is concerned he was to be regarded as the agent of the respondents. (17) That in any event the respondents were to be taken to have had knowledge of the true situation of the buildings contiguous to those insured, acquired through Lodge, and if they had notice they were not misled by anything said in the application in that respect. (18) That the judgment of the Court below proceeded upon the assumption that the Company required not merely the preparation of the diagram by the local Agent, but also the declaration to be made by the appellant of the accuracy of that diagram; this, however, is erroneous, as no communication of such requirements was ever made to the appellant. (19) That even if Lodge had only a limited authority he held himself out as being able to effect the insurance in question upon the bare information he had received from the appellant, and that he did not disclose to the appellant that he was required to sign a written application, either personally or by attorney; (20) That as the shed did not contain any coal oil at the time of effecting the Insurance, and as the shed was a very small one, it was not material to be made known to the Company. And as to the other buildings the Company were estopped by their subsequent conduct and action from saying that it was material that they should have been made acquainted with their existence, as with the knowledge of them they ratified the policies and continued the risk.

Referring to *Wilson v. Standard Fire Ins. Co.*, 29 C. P. 308; *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Naughton v. Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121; *Chatillon v. Canadian Mutual Fire Ins. Co.*, 27 C. P. 450; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Eames v. Home Ins. Co. of New York*, 94 U. S. 630; *Kerr*

*v. Hastings Mutual Fire Ins. Co.*, 41 U. C. R. 217; *Shannon v. Hastings Mutual Fire Ins. Co.*, 26 C. P. 380, 2 A. R. 81. 2 S. C. R. 394; *May v. Buck-eye, &c., Ins. Co.*, 25 Wis. 291; *Marshall v. Columbian, &c., Ins. Co.*, 27 N. H. 157; *Newman v. Springfield Fire Ins. Co.*, 17 Minn. 123; *Sauvey v. Isolated Risk and Farmers' Fire Ins. Co.*, 44 U. C. R. 523; *Worswick v. Canada Fire and Marine Ins. Co.*, 3 A. R. 487; *Brogan v. Manufacturers and Merchants Mutual Fire Ins. Co.*, 29 C. P. 414; *Wood on Insurance*, 79.

The reasons assigned by the respondents in support of the judgment of the Court below were (1) That the evidence shewed that Lodge was the agent of the appellant, and not of the respondents, in negotiating and effecting the insurance in question, as found by the learned Judge at the trial and by all the Judges of the Court appealed from; and the plaintiff was therefore bound by all that was contained in the application as though he had signed it personally. (2) That if Lodge could be regarded as the agent of the respondents at the time when he countersigned the policies, and if the respondents were therefore bound by any knowledge which Lodge had acquired, still they would not thereby have had notice or knowledge of the existence of the coal oil shed, for Lodge himself was ignorant of it, and the appellant should bear the consequences of the omission to communicate the information. (3) That the appellant himself had been an insurance agent, and acknowledged that he knew that applications for insurance were always required to be signed by the applicant; and he expressly authorised Lodge to do all that was necessary, and therefore incidentally to fill up and sign the application in question for the appellant, and if Lodge had any notice or knowledge of the existence of the coal oil shed the appellant was bound by such knowledge. (4) That the existence of the coal oil shed and of the buildings within 100 feet of the property insured was most material to be made known to the respondents, as they would not have accepted the risk in question if the facts had been disclosed



to them. (5) That the answers set forth in the application to be answered by the applicant were quite distinct from the diagram or plan, and it was upon the faith of the accuracy and truth of those answers that the insurance was granted, and the fact that both a diagram and an explicit answer to question No. 7 were required, shews that the respondents, at least, considered both to be distinct and requisite, and they had the right to rely upon whatever was stated by the applicant in answer to the question. (6) That the appellant was not entitled to any benefit under the second Variation Condition for the following reasons :—[a]. Lodge was not the agent of the respondents, in preparing the diagram or plan, and the appellant himself was responsible for its accuracy under the terms of the policy. [b]. Lodge never made a personal inspection of the property insured within the meaning of the condition in question. [c]. Even granting that Lodge was the agent of the respondents at the time and had made a personal inspection, the diagram or plan was not prepared by him “after” such personal inspection, within the meaning of the condition, for the reasons given in the judgment of His Lordship Chief Justice Wilson. (7) That the appellant was not entitled to claim the benefit of any portion of Variation Condition No. 2, unless he were willing to be bound by the whole of that condition, for one portion can not be relied on and the other repudiated, and if the whole condition were binding the appellant’s case must fail. (8) That if the respondents had assumed that Lodge had made a personal inspection, and the assumption turned out to be grounded upon a misrepresentation or fraud, there was nothing to prevent them from taking advantage of the true state of affairs; and it was immaterial what the appellant thought in this respect. (9) That if it should be considered that under the terms of the policy the answer to question No. 7 was a warranty, then the only point was whether the answer was true or false, and the question of estoppel was inapplicable. (10) That under the terms of

the policy the diagram might be filled in by either the applicant or the agent; and under the terms of Variation Condition No. 2, if the applicant fill in the plan he thereby makes it a part of the application, and warrants its accuracy. It was only when their agent had prepared the plan "after a personal inspection" that the respondents agreed to exclude the contents of the plan from the general warranty. In the present case the plan was attested by the appellant in his own name through Lodge as his agent, and the appellant himself was therefore alone responsible for its contents. (11) That the evidence shews that there was coal oil in the shed at the time of the application, and that in fact coal oil was always stored there in greater or less quantities, and it was therefore a highly dangerous building to have near the insured premises; but when the shed and adjoining buildings were burnt down the dangerous element was removed from the risk, and the respondents were justified in continuing the policy in force. \* \* \*

(14) That even assuming that Lodge, in filling up the diagram, was the agent of the respondents, the appellant was not entitled to claim that he was thereby relieved from the misrepresentations contained in his answer to the question as to the manner in which the buildings to be insured were surrounded. (a) For if the answers were to be treated as warranties, it was immaterial whether Lodge made similar mistakes in preparing the diagram on the back of the application. (b) If, however, they should be treated as matter of misrepresentation or concealment, then it was clear that the undisclosed surrounding buildings were important to be made known to the respondents to enable them to judge of the risk; and the materiality of the misrepresentation or concealment having been established, the distinction between a warranty and a misrepresentation ceased, and as Lodge was in fact ignorant of the coal oil shed being in the place it was, the respondents, even if Lodge had acted as their agent, could not be affected with the knowledge of a fact of which he was in ignorance.

They referred to *Macdonald v. Law Union Ins. Co.*,

L. R. 9 Q. B. 338 ; *Geach v. Ingall*, 14 M. & W. 95 ; *Anderson v. Fitzgerald*, 4 H.L.C. 484 ; *Anderson v. Thornton*, 8 Ex. 425 ; *Cazenove v. British Ass. Co.*, 6 C. B. N. S. 437 ; *Redford v. Mutual Ins. Co. of Clinton*, 38 U. C. R. 538 ; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565 ; *Billington v. Provincial Ins.<sup>r</sup>Co.*, 3 S. C. 182 ; *Sowden v. Standard Ins. Co.*, 44 U. C. R. 95 ; *Baines v. Ewing*, L. R. 1 Ex. 320 ; *Linford v. Provincial, &c., Ins. Co.*, 34 Beav. 291 ; *Rokeback v. Germania Fire Ins. Co.*, 62 N.Y. 47 ; *Bleakly v. Niagara District Mutual Ins. Co.*, 16 Gr. 198 ; *Mason v. Agricultural Ins. Co.*, 16 C. P. 493, 18 C. P. 19 ; *Anderson v. Pacific Fire and Marine Ins. Co.*, L. R. 7 C. P. 65 ; *Ionides v. Pacific Ins. Co.* L. R. 6 Q. B. 674 ; *Wood on Insurance*, 389, 392.

*Bethune*, Q. C. and *J. B. Dixon*, for the appellants.

*McCarthy*, Q. C. and *A. C. Galt*, for the respondents.

March 23, 1883. SPRAGGE, C.J.O.—This case, it is evident, has been very carefully considered both by my brother Patterson, before whom it was tried, and in the Court of Common Pleas. Unfortunately different conclusions have been arrived at, the learned Judge who tried the case holding that the plaintiff was entitled to recover, and the Court of Common Pleas directing that a verdict should be entered for the defendants.

The chief question arises upon the construction of the company's addition to the first statutory condition of the policy, which addition runs thus: "And such application or any survey, plan or description of the property to be referred to herein, shall be considered a part of this policy, and every part of it a warranty by the assured but this company will not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection." The 20th condition is varied, *inter alia*, in these terms: "And in case any agent takes part in the preparation of the application for this insurance, he shall, with the exception above provided for in case of a diagram

or plan, be regarded in that work as the agent of the applicant."

Some very nice points are discussed in the learned judgments delivered by Mr. Justice Patterson, and by the Court, upon the view to be taken of these conditions; and upon the question whether the first part of the addition to the first condition is to be read as a warranty, or as a representation, and upon the effect of what follows it, upon the earlier part of the condition. To me it seems immaterial whether the first condition with this addition is to be regarded as a representation only or as a warranty, because, as put by the learned Judge, the materiality of the information was beyond question, certainly as regards the coal oil shed, and as he thinks, and I agree with him, as regards also the other buildings within one hundred feet of the building insured; and I agree with him also, that there was nothing unreasonable in the company asking what buildings were within the one hundred feet, nor anything in the nature of the omitted buildings to make it unreasonable to complain of the omission.

In the application it is put thus: "External exposure—What is the distance, occupation, and materials of all buildings within a hundred feet;" and underneath to be answered separately "North, West, South, East." A true answer upon these several points—distance, occupation, materials—were material to be made known to the company in the words of the first condition, "in order to enable them to judge of the risk they undertake." Both the learned Judge and the Common Pleas agree that the statements in the application that the insured buildings were isolated at the north, and that the only building to the west of the insured buildings was a brick hardware store, were misrepresentations which, taken by themselves, made the assurance of no force or effect.

Taking, therefore, these answers to the questions put under the head "external exposure" they were representations which under the first condition were a breach of

avoid the policy. Taking them to be simply representations, not warranties, that was sufficient. The plaintiff then must fail unless he can find something elsewhere to counteract the effect of this representation. There is nothing pointed at for this purpose except the words: "But this company will not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection." These words and their proper construction are, as it seems to me, the real turning point in the case.

They must, in my opinion receive the same construction whether what they follow be a representation simply, or a warranty: see *Newcastle Ins. Co. v. Macmoran*, 3 Dow. 255; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452. We cannot discard them, they have their office and meaning; and that I take to be, to qualify, under given circumstances, what has gone before; as though it had been thus expressed. "The application or any plan or survey referred to therein, (all which are acts of the applicant for insurance) are to be taken as parts of the policy, and as warranties, but, notwithstanding this, the company undertakes not to dispute the correctness of a diagram or plan prepared by its own officer from his own personal inspection."

If there be no such plan the assured must abide by his own representation. But if there be such plan he has that to fall back upon. It is a provision held out by the company to the world as an inducement to insure with them. Its ordinary import—what would be generally understood—would be, persons insuring may make mistakes and omissions; and when they mistake anything or omit to state something that ought to be correctly made known, we desire not to be embarrassed with questions whether what is misstated or omitted is material; but the applicant has only to see that a diagram prepared by our agent is sent in, and he will be safe. These words either mean this or they are a snare, calculated, I will not say intended, to delude persons intending to insure.

There lie, however, behind this some very important questions both of law and fact. The local agent of the

company did send in, with the application, a diagram purporting to be of the premises proposed to be insured together with contiguous buildings; and with it, answers to questions as follow: "Have you made a personal survey of the risk?" Answer, "Yes." Then further, under the head "Exposures," "Agents will describe all buildings within one hundred feet, or endangering this risk, of what material built, and how occupied; and also make a complete diagram of the same, including the premises to be insured; also the amount this company have at risk within one hundred feet;" and underneath are the words: "North, isolated. South—across St., St. Lawrence Hall Hotel, brick. East—C. Quinlan's brick block. West—brick, tin roof."

The first question that presents itself is, there being in fact a diagram sent in by the agent with the plaintiff's application, and that diagram represented by the agent to have been made from his personal inspection (for I take that representation to be involved in his answers to questions which I have quoted), whether it is open to the company to shew, that the diagram was not in truth prepared by the agent from his personal inspection. The diagram, although a matter between the company and its agent, was still a matter in which the assured was interested, inasmuch as it would under certain circumstances, afford him protection; and it would not be an unreasonable contention on his part that if he saw that a diagram was sent in, it was a matter between the agent and the company, whether it was prepared from personal inspection as required by the company, and as represented by the company's agent that it had been prepared.

There are two grounds upon which it strikes me such contention may be reasonable; one, the ground taken by the present Chief Justice of the Supreme Court, in *Hastings Mutual Fire Insurance Company v. Shannon*, 2 S. C. R. 407, that the knowledge of the agent is the knowledge of the company; the other, that there is an estoppel in pais; that the company ought not to be admitted to

shew as against the insured, that the diagram prepared by their agent, their accredited officer for that purpose, was not in fact what it purported to be.

This point, however, has not been dealt with in any of the judgments delivered in this case, and has been very briefly spoken to by counsel.

The point really debated, and debated at considerable length, has been whether this diagram sent in by the agent fulfilled the requirements of the condition in the policy, *i. e.*, whether it was prepared by the company's agent from personal inspection. This assumes, of course, that it is incumbent upon the assured to shew that there was a personal inspection, and that the diagram was prepared from it. The judgment of the learned Chief Justice assumes that more than this is incumbent upon the assured. He says that the words used must mean, "that the plan, which is to be *from* a personal inspection, shall represent truly that which he has seen," not as he explains, that mistakes such as the most careful may commit would not have to be allowed for, and be at the risk of and binding upon the company; but, he adds: "There is a difference between a false and misleading sketch of the kind made here, and a mere inadvertent mistake in a plan prepared from a personal inspection." I understand the learned Chief Justice to mean that if a plan, such as was in fact sent in by the agent in this instance, had been prepared and sent in; the agent having made a personal inspection, and the plan prepared therefrom; that such a plan would not be binding upon the company. I cannot agree in this. The company say that they will not dispute the correctness of such a plan. This assumes that it may be incorrect, and engages that although incorrect, it will not on that account be disputed by the company. It would, of course, be a different thing if collusion between the agent and the assured were shewn; but nothing of the kind is imputed here.

The plaintiff in my judgment need shew no more than that the diagram sent in was prepared by the agent from

a personal inspection ; and I think we must take these words to have been very carefully framed by the company, to limit its liability so far as would be consistent with the provision being held out to the world as beneficial to the insured. Much has been said as to what the words used do require ; something may be said as to what they do not require. They do not require that the inspection or diagram shall have been made *for the purpose* of the particular application for insurance for which they are used ; as seems to be implied in some passages of the judgment of the learned Chief Justice. They do not require that either should have been made within any particular time before such application ; and when we turn to the questions required by the company to be answered by its agent upon this head, we find no more particulars required. And I do not find that it is necessarily to be inferred that the inspection and plan were to be prepared for the purpose of the application about to be made, or to be contemporaneous with it ; and instances may readily be put where it would be little more than an idle ceremony to do so. The case may be put of an isolated dwelling house, inspected by a local insurance agent, and a diagram prepared from such inspection ; the house in his immediate neighbourhood, and seen by him, and it being known to him as a fact that from the time of his inspection and for six months afterwards it remained as to outward exposures precisely as it was when inspected. Or take the case of a row of half a dozen houses, or of a dozen semi-detached, and an application to this company for the insurance of one of them ; and suppose an inspection of the same houses to have been made six months before by the same agent and a diagram prepared therefrom, and suppose the agent to have known as a fact from his frequent passing and observation of these houses that the one the subject of the application remained, as I have put it in the case of the isolated dwelling, unchanged as to outward exposures. Other instances might be put. In these and the like cases, what would naturally be done by the agent ? He has in his hands a



diagram made from actual inspection, and he not only knows of no change, but he knows that there has been no change. If he made another diagram it would be from the actual inspection made six months before; otherwise it would not be made from personal inspection at all, or he would make a formal inspection for the purpose.

I have put the cases that I have supposed, not for the purpose of shewing that an inspection and diagram for the purpose of an insurance, and contemporaneous with it, would necessarily be useless in any case; but for the purpose of shewing that it is not a matter of necessary implication from the words used, that such an inspection and diagram are, as a matter of construction, thereby called for as they are certainly not called for in terms.

It would have been more satisfactory if the evidence had been more distinct in regard to the agent's inspection and the preparation of the diagram. It appears, however, that there was a diagram; and it appears, though with less distinctness as a matter of memory, that there was an inspection—the inspection some six months before the application, and made upon an application, not this application, for an insurance. It does not appear when the diagram was made. The inference I take it is, that it was made from the inspection, and if so it comes literally within the terms of the condition. The knowledge of the agent as to the state of the property and the absence of change in the matter of external exposure, is described in evidence much as I have described it, in the cases I have supposed. He certainly made no inspection for the purpose of this diagram, but says that he passed the premises three times a day, and knew them as well as he knew his own back yard. Then, as a fact, there was not between the inspection and the application for this insurance any change in external exposures. There was a latent danger unknown to him, and I should say, from the evidence, unknown to the plaintiff also, at both dates. There was no bad faith on the part of the plaintiff, nor, as it appears, on the part of the company;

but great fault on the part of the agent of the company, in omitting from the diagram elements of danger which really existed, and which were known to him, and in not stating them in answer to questions. I refer here to buildings within 100 feet, which were known to the agent, not to the coal oil shed.

It cannot be said that if the condition as to inspection and preparation of diagram had imposed upon the agent in terms the duty of a contemporaneous inspection it would have been useless. He had not on his previous inspection discharged all his duty, for he had inferred from the outside appearance of a small building that it was harmless, and did not increase the risk; he ought to have verified his supposition, when he would have found it to be an element of great danger. Upon a re-inspection it might have occurred to him to do what he ought to have done before; but that only shews that a condition imposing upon the agent a more definite and stringent duty might have disclosed that which as it is remained undisclosed.

I have noticed so far only shortly the first question that presents itself, and have referred upon it to *Hastings Mutual Fire Ins. Co. v. Shannon* 2 S. C. R. 394. The policy in that case contained a clause very similar to the one in the case before us. After providing that if an agent of the company fill up an application he shall be considered as acting for the applicant, these words are added, "but the company will be responsible for all surveys made by their agents personally." The agent did make a survey and a diagram. which was shewn to the applicant for insurance. The diagram was erroneous, in representing one building as distant 140 feet from the premises to be insured, whereas it was distant only 110 feet; and another which was distant only 60 feet as at a distance of 100 feet. The applicant, thinking, as stated in the report of the case, that the distances stated in the diagram were not or might not be strictly accurate, and that the same might possibly in other respects be imperfect, drew the attention of Morris, (the agent,) thereto before and at the time of his (the appli-

cant's) signing the application. The agent said it was sufficiently accurate, and that, at all events, he would go to the property and make an accurate measurement, and if necessary correct any errors before sending in the papers to the directors of the company. It was made a point by counsel for the company that the applicant knew that the application and diagram misrepresented the facts and trusted to "his friend," the company's agent, to correct the same, and this, he says, was not done.

It is upon this state of facts that the learned Judge by whom the judgment of the Court was delivered, observed: p. 407: "Who but the company is to be responsible for his [the agent] not making a more accurate examination and survey \* \* \* and which, being connected with what was clearly within the scope of his agency, must have the same effect as if communicated directly to the company, the knowledge of the agent in such a case being the knowledge of the company, or in other words, in such a case notice to the agent being notice to the principal." Now it is clear that in the case that I have quoted from the agent had notice that the diagram which he sent in to his company was incorrect in points upon which it was material to the company to be correctly informed; and it was held that the company was affected with that notice, with "the same effect as if communicated directly to the company." That was exactly what was the case here, so far as what appeared upon the face of the diagram was concerned. Lodge, the agent, knew of the existence within 100 feet of the paintshop and other buildings affecting the risk, and his knowledge was the knowledge of the company. In this view, how and when the diagram was made is immaterial, but as to that the principle of the decision in the case that I have quoted applies also. It was within the scope of the deputed authority of the agent to prepare it. How and when it was prepared was a fact within his knowledge; and his knowledge was the knowledge of the company. This case is not referred to in either of the judgments delivered in the Common Pleas. It appears to

me that the case before us is not in principle distinguishable from it. The case of *Peoria Marine and Fire Ins. Co. v. Hall*, 4 Bennet Fire Ins. Cases p. 738-743, was decided upon the same principle.

I have examined all the cases to which we have been referred, but have not felt it necessary to cite any others than those from which I have quoted. Upon the whole, my opinion is, that the rule obtained in the Court of Common Pleas should have been discharged. The result is that the appeal to this Court is allowed, with costs.

HAGARTY, C. J.—After the best consideration that I can give this case I find myself unable to agree with the conclusion at which my learned brothers in the Common Pleas has arrived.

It seems to me that too rigid an interpretation has been applied to the clause as to a diagram “prepared by the agent from a personal inspection.”

If there be any approach to evidence as to any collusive understanding between the agent and the assured, I see strong ground for requiring satisfactory proof.

Here the plaintiff knew the agent well, they live in the same place. He knew that the agent is well acquainted with the premises, as well in fact as he was himself, the agent had on former occasions made personal inspections of them, and undertakes to prepare the diagram, the plaintiff knowing he has such special knowledge.

If the agent through carelessness prepare an erroneous diagram, I cannot see why, in a case free from fraud, the company should not be bound by it.

They inform the public that they will accept such a diagram.

If it be prepared erroneously without the active concurrence or knowledge of the assured, it appears to me to be most unjust and not warranted in law to throw the consequences of this agent's blunders on the assured.

In addition to this clause as to accepting such a diagram, the application on its face declares that agents are to

answer questions as to the actual position of the risk, and to state all buildings within one hundred feet &c., and also to make a diagram.

In the majority of insurances the applicants know little or nothing of preparing plans or diagrams or making correct statements as to "exposures."

If the agent shew his answer to the applicant or inform him how he describes the place, it would in most cases be certain that the applicant would accept his description without question.

From the multitude of insurance cases that have come before us we cannot but know that the company's agent almost always prepares the application and descriptions, or at least instructs the applicant how to fill up the former. The companies, with untiring ingenuity, try to throw all the consequences of all errors committed either in good faith or bad faith by their agents on the unfortunate applicants by whom they have probably been induced to apply by florid assertions of the integrity of their principals and by offers to draw all the necessary papers and save all trouble, &c.

I never could understand on what principle of justice they should be allowed to take this course.

They select the agent; they make it his interest to obtain risks; they receive the premiums from him; but at the same time strive to provide by special conditions that the applicant is still to lose his insurance if the agent make any mistake.

In the case before us the application does not contain (as it sometimes does) any warning that the agent is to be considered the applicant's agent in preparing the papers. This provision appears for the first time in the conditions of the policy, as a variation from the statutory condition. In their instructions to their agent they declare that the agent "must see that it is carefully filled up, and satisfy himself that the diagram on the back of it shows every exposure within the distance named. He must also answer the inquiries on the back of it, which are directly submitted to him."

The applicant himself or his attorney must sign it (the application) and be made to understand that he is responsible for all it contains.

Here they adopt and act on an application on its face professing to be signed by the applicant by and through P. P. Lodge, their agent. So that they were directly cognizant of the fact that Lodge prepared the papers and diagram.

They were willing to trust to his correctness, and accepted the risk. They now urge that the applicant should not have trusted him. They urge that the plaintiff is bound by the condition as to agency in the policy subsequently issued even if he never read it. May he have, not unreasonably, assumed, even if he read it, that they issued it with direct notice that their agent had prepared everything, and that they would be satisfied with his properly doing his duty?

I do not dwell on the suggestion that the plaintiff had previous familiarity with insurance business. It might be used as an argument on the other side, that with such knowledge he would the more readily leave everything to be done by the agent.

It seems most unreasonable to hold an applicant bound by a special clause in a subsequently executed policy as to the agent being his agent in the previous preparation of the papers. He, at all events, ought to know it at the critical time when the knowledge might be of some use.

For myself I would desire a legislative enactment that companies should not be allowed, except in cases of fraud or collusion, to repudiate the acts or representations of their agent, or to attempt to make him—what he is not—the agent of the applicant and not of his real employers.

The Court below discussed fully the effect of the condition as to warranting the statements in the application and waiving of objections to the agent's diagram. It seems to utterly destroy the apparent value of their agreement to accept his diagram, and in the same breath to hold the applicant bound by the application even if it contain the identical description that is in the diagram.

"We shall not dispute agent's accuracy when he stated that there are no buildings within a hundred feet, but if you say the same thing in the application we can dispute it, and destroy your insurance." Such is the position taken by the defendants.

I have no right to assume that this was designed as a trap for applicants to fall into, but I can hardly conceive anything more aptly fulfilling the purpose of a trap.

Except in the case of a man of unusual keenness and intelligence, no applicant would question the agent's diagram, or take care to see that the application did or did not correspond with it, or think of questioning its accuracy. In the present case the same man drew this diagram and filled up the application, and it is difficult to separate them, or say where one ends and the other begins.

I cannot believe that we should be doing right in accepting the defendants' contention. If we do, we authorize what I cannot help regarding as a wholly unfair proceeding towards the plaintiff, and allow a provision professing to be a favour and advantage to applicants to be used as a deception to mislead.

As to the coal oil shed I accept the finding at the trial, that the plaintiff knew nothing of the shed or of its use.

I think the appeal should be allowed.

ARMOUR, J.,\* concurred, and thought that interest should be allowed on the amount of the verdict since the time it was given.

The case was thereupon directed to stand over upon this point, and

June 29, 1883. SPRAGGE, C. J. O.—At the giving of judgment in this case, Mr. Justice Armour expressed the opinion that the plaintiff should be allowed interest on the amount adjudged to be payable to him by the learned Judge who tried the action, and which judgment this Court has indirectly affirmed. I should readily concur in allowing interest if I could see my way to do so.

\* MORRISON, J. A., was absent when judgment was pronounced.

The case stands thus : The appeal to this Court is from an order of the Court<sup>7</sup> of Common Pleas, setting aside the verdict for the plaintiff, and directing that a verdict should be entered for the defendants ; and the appeal to this Court is successful.

The learned Judge referred to the case of *Rodger v. Comptoir D'Escompte de Paris*, L. R. 3 P. C. App. 465. In that case the appellant had paid a large sum of money to the respondent under a judgment of the Supreme Court at Hong Kong ; and the judgment of that Court having been reversed in the Privy Council, and the appellant having consequently become entitled to repayment of the money paid by him, the question was, whether he was also entitled to interest upon the money which he had paid, and, which, as put by Lord Cairns, it is now ascertained was by the Court below ordered to be paid by mistake and wrongfully. And he adds, p. 475 : " They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at, unless the persons who have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld," and his lordship refers to *Blake v. Mowatt*, and he believes other cases in the House of Lords, where interest had been allowed upon money paid under the like circumstances.

All this proceeds upon the principle that where money has by mistake and wrong been taken out of the hands of a person, and enjoyed by a person who has so obtained it, it would be but imperfect justice, in ordering the repayment of the money, to order its repayment without inter-



est. Interest, however, if allowed in this case would be allowed, not upon the principle that the appellants' money had by mistake and wrong got into the wrong hands, and been enjoyed by the wrong person, but that the respondent had kept his own money in his own hands when he ought to have paid it to the appellant; and that by itself without more is not sufficient to entitle a party. The one case proceeds upon the principle of restitution; this does not, but upon giving damages and that in certain cases, not in all.

There are certain classes of cases in which a jury may give interest, which are to be found under the wrong heading of sections 266, 267 and 268, ch. 50 of the Revised Statutes, the Common Law Procedure Act, and among them we find "Actions on policies of insurance."

In this case the learned Judge before whom the action was tried, without a jury, declined, in the exercise of his discretion, to allow interest upon the sum which he adjudged to be recoverable, and in that I do not think that under the circumstances he was wrong. The next section, 269, defines in what cases a verdict shall bear interest. It is, where the "verdict is rendered for any debt, or sum certain, on any account, debt or promises." The verdict in this case does not fall within the class so defined. If it did, the plaintiff might, I apprehend, indorse his writ of execution for such interest upon his verdict, such being the proper course, as I learn from those members of the Court who are better acquainted than I am with the practice in such cases, and he would not need any order from this court.

It is only in one class of cases that interest is given by the Court of Appeal Act, R. S. O. ch. 38, in cases in the Court, and that is under section 43, that, "When, on an appeal against a judgment, in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal." In the converse case of judgment for the appellant, which is this case, we find no

such provision, nor do I find anything in the Court of Appeal Act to give the Court any discretion in the matter of the allowance of interest. Indeed the express allowance of interest in the case of a successful respondent, and the silence of the Act as to any allowance in the case of a successful appellant, goes far to negative any intention to allow interest in the Court of Appeal in any other than the one case provided for; whatever may be the rights of the appellant, without any order by the Court of Appeal.

I have considered section 23 of the Act with a view to seeing whether the general provision that it contains, in relation to the power of the Court, can properly be read as enabling the Court to give interest in such a case as the one before us. It is as follows: "The Court shall have power to dismiss an appeal, or give any judgment and make any decree or order which ought to have been made, and to direct the issue of any process, or the taking of any proceedings in the Court below, or to award restitution and payment of costs, or to make such further or other order as the case may require."

I see nothing in this section to give jurisdiction in regard to the allowance of interest. Where it speaks of awarding restitution it is as punctuated, (and it is the same in the C. S. U. C.,) only in relation to costs, and besides this is not a case of "restitution;" and the general words, "to make such further or other order as the case may require," can only be read as meaning such further or other order as is warranted by the facts and law of the case, not as conferring any such power as it has been suggested is possessed by the Court.

If this case had been a *paraded case* to treat in the Privy Council, or any other case falling within section 23 of the Common Law Procedure Act, the plaintiff would have been entitled to interest in his verdict, and such a case would be brought to this Court for it. In fact there is no case in which he is entitled to it but he has a right to have it from the Court for it, and the Court would award it in any case in which he is entitled to it. It is not a case in which

this Court. My conclusion is, that this Court cannot properly make any order for the allowance of interest ; unless it be simply following section 269.

In the same case after the delivery of judgment Mr. Galt called our attention to the fact that there was a demurrer in the case, and which he said we had not disposed of. Upon turning to my notes of the argument I do not find that any argument was addressed to us upon the demurrer. Before saying anything further upon the subject I desire to express my entire concurrence in the observations of the learned Chief Justice of the Common Pleas upon the pleadings in this case. After observing that the pleadings are "unnecessarily long," he adds, "The declaration contains every condition and variation. The pleas are repeated verbatim to each of the two counts ; the replications to each set of pleas, and the demurrers to each separate replication. Such pleadings are only a hindrance to the cause, for out of all this pleading but very few issues have been raised." I find no less than eighteen pleas ; these and the replications and demurrers, as well as the declaration, have received the just comment and reprobation of the learned Chief Justice.

Counsel for the defendants not having pointed out to us, wherein the plaintiff's replications are demurrable, it is scarcely reasonable to expect us to wade through such a mass of pleading to find it out for ourselves. I have however, made myself acquainted generally with the defendants' objections, as I understand them. The defendants' pleas of untrue representation to the knowledge of the plaintiff are a good bar to the action. The replications set up the clause in the conditions respecting the diagram prepared by the defendants' agent from personal inspection ; and aver that such diagram was prepared by the agent, and returned by him to and acted upon by the defendants. The replications however do not in terms admit the representations alleged in the pleas, and for that reason, as I understand, it is objected by demurrer that the replications are not good as pleadings in confession and avoidance.

But the replications do not deny the alleged untrue representations, but simply plead matter in avoidance ; and that, if I am correct in my understanding of the rules of common law pleading, is an admission of the fact alleged in bar, and if the matter alleged in avoidance be good in law, it is good pleading in confession and avoidance ; and that the matter alleged in avoidance is sufficient in law we have adjudged in the judgment already given.

I still think that that judgment is right, and have nothing further to add to it.

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## BADENACH V. SLATER.

*Fraudulent preferences—Trust deed for benefit of creditors.*

By an assignment, for benefit of creditors, of all the real and personal estate of the assignors, the assignee was empowered to sell the property assigned "by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to these presents," and the trusts were declared to be, (1) for the payment of expenses, (2) to retain a reasonable compensation, based upon the time and trouble bestowed in and about the trusts, (3) after a just and equitable distribution of the expenses as between partnership and separate estate, "to pay and divide the residue of the partnership estate and the surplus of the separate estates unto and among all and every the creditors of the said partnership, according to the amount of their respective claims ratably and proportionably; and the respective separate estates (less proportion of the costs, charges, expenses, and allowances), and any surplus of the partnership estate, unto and among the separate creditors respectively," and it was provided that the assignee "shall only be answerable or chargeable for wilful neglect or default." *Held*, affirming the judgment of the Court below, that the deed could not be impeached as a fraudulent preference of creditors within the Act R. S. O. cap. 118.

THIS was an interpleader issue. It appeared that the defendant had sued Cornish & Co., and on the 6th of January, 1881, obtained judgment against them for \$1,032.21, on which he sued out execution. On the 28th of December, 1880, and before defendant obtained his judgment, Cornish & Co. executed a deed of assignment of their property to the plaintiff as trustee, for the benefit of their creditors, and the plaintiff contended that he entered into possession under that deed. On the 6th of January, 1881, the defendant placed his execution in the sheriff's hands; under which the sheriff seized the goods mentioned in the deed of assignment, and the plaintiff claimed to be entitled to them as against the defendant. Upon the application of the sheriff an interpleader issue in the Common Pleas was directed. The issue was tried before Chief Justice Wilson at the York Spring Assizes, 1881, and a verdict entered for the plaintiff. The defendant moved for a Rule Nisi to set aside the verdict, and to enter a verdict for the defendant, which was refused. The defendant

thereupon appealed to this Court, and the appeal came on for argument on the 20th January, 1882.\*

*Gibbons*, for the appellant.

*Foster*, for the respondent.

For the appellant it was contended that the Deed of Assignment was bad, in that it provided for the payment of fees to the trustee, and at the same time provided that he should only be responsible for "wilful default or neglect," whereas the law would cast on a paid bailee the duty of ordinary care and diligence, and the debtor had no right to deprive the creditors of this protection. Besides, the deed does not provide for the payment of privileged liens, such as taxes in full, and by its provisions the creditors of the firm were deprived of an interest in the debtor's private estate until the private estate creditors were paid, whereas in the absence of a bankrupt law they had a right to rank on the same.

On behalf of the respondent it was contended that the learned Judge who tried the cause found expressly that prior to the seizure under the plaintiff's execution there had been an immediate and continued change of possession of the goods, and the assignee held them, *bond fide*, in his actual possession: *Maulson v. Commercial Bank*, 17 U. C. R. 30; and that the provision for remuneration to the assignee could not affect the validity of the assignment: *Metcalf v. Keefer*, 8 Gr. 392, R. S. O. ch. 107, sec. 37.

The exemption of the assignee from responsibility for other than "willful default or neglect" has the sanction of long use, in similar cases, by conveyancers: *Crabbe's Con.* 5th ed., vol. 1, p. 596.

Had the proviso been omitted, the protection it contemplated would have been supplied by the act respecting trustees and executors (R. S. O. ch. 107, sec. 2). Mere verbal distinctions as to negligence are ignored in deter-

\* *Present*:—SPRAGGE, C.J.O., BURTON, PATTERSON, J.J.A., and CAMERON, J.

mining the measure of liability. See remarks of Moss, C.J., in *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 623.

It was also contended that the absence of provisions for the payment of "privileged liens" could not vitiate the assignment. If such "liens" exist they find the property to which they are attached unaffected by the assignment: *Re McCracken*, 4 A. R. 486; *Perry on Trusts*, sec. 596. An assignee may pay taxes even if authority not specifically given in the assignment: *Burrill on Assignments*, 4th ed. 669.

Creditors holding security were, even under the bankruptcy law, exempt from submission to an enforced valuation: *Deacon v. Driffl*, 4 A. R. 335. The law supplies the mode of dealing with secured creditors: *Gore Bank v. Sutherland*, 1 U. C. L. J. N. S. 159.

The rule in Equity is that the separate estate of a partner is to be applied first in discharge of his separate debts, and that it is the surplus only to which joint creditors of the partnership are entitled: *Baker v. Dawbarn*, 19 Gr. 113; *Re Walker*, 6 A. R. 172.

The material provisions of the deed, and the facts of the case, sufficiently appear in the judgments.

February 6th, 1883, PATTERSON, J. A.—The deed of assignment which is attacked by the defendants, who are execution creditors of the assignors, was made on December 28th, 1880.

The objections to its validity which were insisted on before us, are set out in the reasons for appeal. They are four in number.

The first is, that the deed provides for the payment of the trustee, and at the same time provides that he shall only be responsible for "wilful default or neglect," while it is alleged the law would cast on a paid bailee the duties of ordinary care and diligence, and the debtor had no right to deprive his creditors of this protection.

Secondly, it is objected that the deed does not provide for the payment of privileged liens, such as taxes in full.

Thirdly, that a just deed should have provided for the valuation in some equitable manner of the security held by creditors on the assignor's estate.

And fourthly, that the deed would deprive the joint creditors of an interest in the separate estates until the separate creditors were paid, whereas in the absence of a bankruptcy law their right is to rank on separate as well as joint estates.

The assignors are two persons who carried on business as dealers in boots and shoes, as partners, upon premises which were the property of one of them, but subject to three mortgages. By the deed the partner owning the premises grants them to the assignee, and the other partner also grants any estate he may have therein. The partners then jointly grant all their stock in trade, book-debts, securities, &c., &c., and all other real and personal estate and effects of them, and each of them. The assignee is to get in the estate, "and sell the said real and personal property hereby assigned by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." The trusts are: (1). In the first place to pay expenses: (2). In the next place to retain a reasonable compensation, based upon the care and trouble bestowed in and about the due execution of the trusts; (3). In the next place, after the just and equitable distribution of the expenses as between the partnership and separate estates, "to pay and divide the residue of the partnership estate and the surplus of the separate estates, unto and among all and every the creditors of the said partnership, according to the amount of their respective claims, ratably and proportionably; and the respective separate estates (less their proportion of the said costs, charges, expenses and allowances) and any surplus of the partnership estate, unto and among the separate creditors, respectively, of the parties of the first part respectively, according to the amount of their respective claims, ratably and proportionably, if such separate



estates and said surplus of the partnership estate do not suffice to satisfy the same in full"—and it is, among other things, provided that the assignee "shall only be answerable or chargeable" for wilful neglect or default.

These are the only particulars of the assignment necessary to be referred to in order to apply the objections which we have to consider.

The objections are founded upon the act respecting the fraudulent preference of creditors by persons in insolvent circumstances—R. S. O. c. 118—the second section of which avoids every assignment made by a person in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, with intent to defeat or delay his creditors, or with intent to give one or more of his creditors a preference over his other creditors, or over any one or more of such creditors; but which declares that nothing therein contained shall invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably, and without preference and priority, all the creditors of such debtor their just debts.

The objection taken in the first ground of appeal has, I think, been conclusively met by Mr. Foster's answer, that the deed only declares what without the declaration would be imported into it by the statute R. S. O. ch. 167 sec. 2. The decisions of American Courts, cited by Mr. Gibbons in support of his objection, recognize the validity of the answer.

In *Litchfield v. White*, 3 Sandford 545, affirmed 3 Selden 438, the Superior Court of the city of New York, and afterwards the Court of Appeals, held that words exempting a trustee for creditors from liability except only for his "gross negligence or wilful misfeasance" were evidence of intent to hinder, delay and defraud creditors, because the assignment withdrew the debtor's property from the reach of the creditors, and exposed it to waste and loss unless the assignee chose to exercise a much greater degree of diligence than he undertook to bestow and ex-

empted the assignee from the liability which the law would attach to the office of trustee. In *Maennel v. Murdock*, 13 Md. 164, the Court of Appeals of Maryland considered a limitation of liability to "wilful commission, omission, or neglect" unobjectionable because it did nothing more than declare what the law ascertained as the extent of the liability of the trustees.

The restriction of liability expressed in this deed withdraws nothing from the creditors which would have belonged to them if the words had been omitted, and therefore does not take the deed out of the saving proviso.

The provision for the payment to the trustee of a reasonable compensation for his care and trouble is not objected to as improperly withdrawing any part of the assets from the creditors. The argument is, that a paid trustee is bound to greater diligence than is required by this deed. But the statute refers to "every deed, will, or other document creating a trust, either expressly or by implication," and protects the trustee from responsibility except for wilful default.

The chief difficulty presented by the second and third objections is found in the attempt to discover what relation they have to the proviso. The assignors surrender all they have and direct the trustee to distribute it ratably and proportionably and without preference or priority among all their creditors, as, for the purpose of dealing with these two objections, we must read the deed. The second objection is that they did not direct the payment of some creditors in preference to others: and the third is that they should have interfered with the right of secured creditors to share ratably and proportionably with the others, by requiring them to value their securities on some principle, which must have been enforced by exclusion from ranking with the others if they assented, as that was the only power the debtors could exercise. In either of the two objections assert that the assignment was made in violation of provisions which, if not inserted, would have been likely vitiated it.

The fourth objection is one of more substance, and it raises a question of a good deal of importance. There is no doubt that the effect of the deed is just as put in the objection as taken.

It is to deprive the joint creditors of recourse against the separate estate of either partner until the separate creditors of that partner shall have been paid in full; and also to confine the separate creditors to the separate estates respectively, unless the joint estate is more than enough to pay the joint debts; and in this way it restricts the rights which would have been enforceable by the joint creditors by execution, if the assignment had not been made. The question is, can an assignment which thus regulates the distribution of the estates be said to have been made and executed for the purpose of paying and satisfying ratably and proportionably and without preference or priority all the creditors of the two debtors?

This question must be answered in the affirmative. That the mode of distribution is not in itself unjust or unreasonable is proved by its being that which was prescribed by our own Insolvency Statutes, and which is adopted by courts of equity in administering estates. If no direction on the subject were contained in the deed, and a bill were filed by a creditor for the administration of the estate, the distribution would be made just as directed. Indeed it seems to be the only way in which an assignment by partners who have separate estates and separate debts can be validly made under the statute. If the creditors of the partners were alone specified as objects of the trust, the objection would be that separate creditors were excluded. If joint and separate creditors were to be paid equally out of the assigned joint and separate estates, it would be complained that the separate creditors of one partner might be paid out of the separate estate of the other. If two separate assignments were made, one by each partner of all his estate and effects for the payment of all his creditors, a mode which would appear easy to adapt to the literal requirements of the statute, the deeds might be in form unobjectionable,

but the distribution would really be unequal. The separate creditors could take nothing of the joint estate till the joint creditors were paid; but the joint creditors, being creditors of each partner, would, besides absorbing all the joint estate, rank on each separate estate *pari passu* with the separate creditors. That, it may be said, is just the position all parties would occupy if no assignment were made. But it is, nevertheless, true that it is not one in which all the creditors could be said to share ratably and proportionably. One set would or might be paid in full, and the others be left unpaid.

What the statute seeks to secure is not necessarily the recourse which under execution a creditor might have for his debt. If that were so it should have forbidden assignments altogether.

It may be, that in framing the statute the questions arising in case of insolvent partnerships were not thought of; but we are bound in construing it, to read the word "debtor" as including more persons than one, and it would seem impossible that an assignment by partners could be sustained under the Act if one framed as the present one is, in the particular now in discussion, were held to be invalid.

Thus the defendant fails upon all the grounds of appeal noted in the appeal book.

It does not appear that any other objections to the assignment were taken in the Court below. No others were taken before us until Mr. Gibbons rose to reply after we had heard Mr. Foster in answer to the arguments advanced in support of the appeal. But in his reply Mr. Gibbons took another objection, viz., that the assignment authorized a sale upon credit, and was therefore void, as authority for which he cited *Hutchinson v. Lord*, 1 Wisconsin 286, and referred to *Perry on Trusts*. Mr. Foster, while he did not assent to the starting of this point at so late a stage, referred to *Burrill on Assignments*, where the decisions on the subject are collected.

The numerous cases referred to at page 296 and the fol-

lowing pages of that work shew that the opinions of the Courts of the American Union are divided upon the subject. In the State of New York it seems to have become settled law that a power to sell upon credit vitiates an assignment like the one before us, as being an indication of an intent to delay creditors, and as putting it in the power of the trustee to compel them to wait until the term of credit is expired, in place of being able to insist upon a more speedy distribution of the estate. This was decided by the Court of Appeals in 1852, in *Nicholson v. Leavitt*, 2 Selden 510 ; and is stated to have been ever since that time accepted as the law of that State. There are earlier cases to the contrary, and among them there is the case of *Rogers v. DeForest*, 7, Paige 272, which, though now overruled as far as the Courts of New York are concerned, has for us the weight and value which always belong to the decisions of Chancellor Walworth. The other States in which one view or the other prevails are numerically pretty evenly divided. But the importance of these decisions or of the discussions accompanying them, is much lessened by reason of the difference between the statute which we have to deal with and those under which the question arose in the American Courts. The same difference would have affected the value of even an English decision that a power to sell on credit would vitiate an assignment by virtue of the Statute 13 Elizabeth, c. 5, if there had been any such decision. No English case has, however, been cited to us.

Our statute embraces and extends, and for the purpose of such assignments as that before us supersedes, the statute of 13 Elizabeth. It avoids every assignment made by a person in insolvent circumstances, or knowing himself to be on the eve of insolvency, with intent to defeat or delay his creditors, or with intent to give one or more of his creditors a preference over his other creditors.

The American decisions proceeded, I believe, upon statutes which went no farther than this, and decided that the assignments were valid or invalid as in the view of one Court or another they stood or failed to stand this test,

Our statute, however, goes farther, and declares that the test shall not apply to any assignment which can successfully stand another test which it prescribes. Nothing in what is enacted is to invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably and without preference or priority all his creditors. The test is not the purpose of distributing the estate without delay, or of enabling a creditor to obtain under the assignment his share of the estate as speedily as he might have realized his debt under a *fi. fa.* It is the providing equally for all his creditors. Under this deed they are treated with perfect equality and without preference or priority.

A deed of the kind may, of course, like any other deed, be vitiated by fraud or bad faith; and these destructive elements may be evidenced by the terms of the instrument itself or by some provision, unreasonable or extravagant in its nature, though it affects all creditors alike; or it may be shewn by evidence *dehors* the deed. Evidence of either kind may convince a Court that the real object and intent of the deed was to defeat or delay creditors, while it ostensibly put them all on the same footing. Nothing of that sort is pretended here. The contention is, that the existence of the power in the trustee to do what is frequently authorized by the Court, and what under bankrupt laws may be authorized by the vote of creditors at a meeting, and what may be the best for the creditors, if not the only means of realizing the value of the estate, *ipso facto* vitiates the assignment, and enables the creditor who happens to have the earliest *fi. fa.* to sacrifice the estate to the prejudice of all the other creditors.

I do not think we can reasonably hold that to be the effect of the statute, or that the existence of the power to sell on credit, as we read it in this deed, takes the deed out of the saving proviso or indicates any actual fraudulent intent. It will be noted, though I do not think the validity of the deed depends to any great extent upon it, that the power is to sell "by auction or private contract as

a whole or in portions for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, *having regard to the object of these presents*," and the expressed object is the ratable distribution of the estate.

The view I have taken of the effect of the statute as applied to the objection I am dealing with, is, I think, supported by the decision of this Court in *Gottwalls v. Mulholland*, 3 E. & A. 194, which affirmed a decision of the Court of Common Pleas (15 C. P. 62). The debtors in that case, finding that they could not meet their liabilities, had sold their stock-in-trade to their brother-in-law at the invoice prices, taking his notes at one, two, three, and four years. The explanation of the giving of the long credit was that the goods, which were sold in March, were winter stock, and the purchaser would not be able to realize anything from them until the following winter. In other words, the purchaser was not be expected to pay for the goods until he should have had time to resell them by retail. It appeared that the purchaser was probably aware when he purchased the goods that the creditor, who afterwards seized them in execution, had commenced his action, against the debtors. The jury found that the sale was in good faith to dispose of the property to the purchaser, and enable the debtors to realize from it and to dispose of the proceeds equally among their creditors. The sale was upheld.

In my opinion this objection also fails, and the appeal must be dismissed, with costs.

SPRAGGE, C. J. O.—The first objection is met, as contended by Mr. Foster, and as explained in the judgment of my brother Patterson, by our Provincial Statute R. S. O. ch. 107 sec. 2, which makes wilful default the measure of the liability of a trustee.

What struck me at the hearing as the most serious objection to the assignment, is the liberty thereby given to the assignee to sell the lands and goods assigned, "for cash

or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." It enables the assignee to delay creditors by selling on credit, and can only be supported, I apprehend, under our Provincial Statute R. S. O. ch. 118 sec. 2. We must, I think, read that statute as a modification to some extent of the Statute of Elizabeth, and I agree in the main with the observations of my brother Patterson in relation to it. I take the latter part of sec. 2 to amount shortly to this, that where a deed of assignment is made by a debtor in good faith for the purpose of paying and satisfying ratably and proportionably, and without preference or priority all the creditors of the debtor their just debts, in such case the fact of its authorizing a sale upon credit does not *per se* invalidate it. It cannot be intended to override the earlier part of the statute, which avoids gifts, assignments, and transfers, made with intent to defeat or delay creditors, or to give a preference to some over others. The whole of the clause must be read together, and where an intent to defeat or delay creditors is evidenced by the assignment, it must, I apprehend, be adjudged fraudulent and void, although it provides for the payment ratably and proportionably of all creditors without preference or priority. The fraudulent intent will vitiate in the one case, while the honest purpose will support the instrument in the other case.

The judgment of my learned brother deals so fully with the case that I think it unnecessary to say anything further. I agree that the appeal should be dismissed, with costs.

BURTON, J. A.—I agree in the judgment just delivered by my brother Patterson. The only point on which I have felt any hesitation is in reference to the objection taken by counsel for the appellant during his argument in reply as to the discretion vested in the trustee to sell upon credit

Our statute goes one step further than the Statute of



Elizabeth, which merely avoided instruments made with intent to defraud, hinder, or delay creditors, whereas our statute avoids them if made with intent to give one or more of the debtor's creditors a preference over his other creditors. But an assignment for the benefit of creditors if made *bond fide* with that object could never be impeached under the Statute of Elizabeth, and I apprehend that the proviso in the section of our Statute was added *ex majore cautela*, and that such an assignment giving no preference, would be unimpeachable even without the aid of the proviso, and it must always be a question for the jury whether it was in truth made for the payment of debts, or with the fraudulent intention of defeating or delaying creditors, unless it is manifest upon the face of the instrument itself that some of its provisions necessarily have that effect. Postponing to an unreasonable time the period of sale or payment would be an instance of such a stipulation as might avoid it; but in the absence of any express direction such a postponement by the trustee would generally involve a question of fact; what might be reasonable in one case would be utterly unreasonable in another.

If the deed were silent on the subject, the trustee must be invested with some discretion. He would be unfaithful to his trust if he deferred the sale of perishable articles for any long period, and we can, at the same time, imagine many cases in which it would be disastrous to sell at a particular time or for cash. Unless, therefore, we are prepared to say that, as a matter of law, this discretion to sell by auction or private contract, the whole or a portion for cash or on credit, and generally on such terms and in such manner as the trustee shall deem best, having regard to the object for which the assignment was made, is necessarily *per se* evidence of fraud, we ought not to hold the deed invalid on that ground; it might become so in connection with other circumstances shewing that there was some understanding between the insolvent and the trustee to have a credit sale to the injury of the creditors.

It would be very different if the deed contained a direc-

tion to sell in a particular manner. The insolvent would clearly have no right thus to dictate to his creditors as to the manner of realizing the assets to which they are entitled unconditionally.

The question I am prepared to admit is not free from doubt. It may be contended with much force that the trustee is invested with an unlimited and irresponsible discretion to sell upon credit, but it is coupled with a stipulation that in selling the trustee is to have regard to the object for which the assignment was made, and bearing in mind, as I have already pointed out, that an absolute and inflexible rule that a trustee at all times and under any circumstances should sell for cash would not be in the interest of creditors, and that a sale on credit without adequate security would still leave the trustee exposed to make good the loss to the creditors, I incline, not without doubt, to hold with the other members of the Court that the deed is not *per se* fraudulent on this ground.

There can be no question that the words had better be omitted in assignments of this nature.

On the whole I think the deed may be sustained.

CAMERON, J., concurred.

*Appeal dismissed, with costs.*

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THE DIRECT UNITED STATES CABLE COMPANY, (LIMITED)  
v. THE DOMINION TELEGRAPH COMPANY OF CANADA,  
GEORGE G. SAMPSON AND THOMAS T. BUCKLEY.

*Agreement to submit to arbitration—Nomination of umpire—Neglect or refusal to appoint arbitrator.*

One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named should appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party.

A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, on the agent of the plaintiff company in New York, and on the 19th the plaintiff company, by cablegram from London, named one C. M. D. of New York, as their arbitrator. On the 28th of the same month S. the arbitrator of the defendant company, wrote to C. M. D., requiring him to join in the naming of an umpire; but he answered that he was about to leave the city, and would return on the 30th., and that having been only advised by cable of his appointment and that his commission would be mailed to him, he could not until its arrival intelligently take any action. On the 30th C. M. D. returned to his office, and then wrote to S. expressing his readiness to act, and at the same time confirmed the nomination made by his partners, during his absence, of an umpire.

**Held**, [affirming the decree of the Court below], (1) that the facts did not establish any refusal or neglect on the part of C. M. D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead: (2) that the naming by the arbitrators of an umpire, was not such an act as required C. M. D. to take part in within ten days from his appointment, or in default that his appointment should be vacated, and S. have the right to name a substitute.

The defendants also set up by way of defence and as a ground of demurrer to the plaintiffs' bill to restrain proceedings by the alleged arbitrators. the pendency of another action in New York for the same purpose: but, **Held**, that this could only form a ground for application to stay proceedings, or to compel the plaintiffs to elect between the two tribunals; and, **Semble**, that under the circumstances set out below it could not be taken advantage of in any way.

The agreement for submission contained a clause that it should be made a rule of the Court of Queen's Bench in England, and all proceedings thereunder should be governed as in Great Britain by the provisions of the English C. L. P. Act:

**Held**, that this formed no objection to the jurisdiction of our Court of Chancery.

THIS was an appeal by the defendant company, and also by the defendants Sampson and Buckley, from a decree of

the Court of Chancery, pronounced by Blake, V. C., and reported 28 Gr. 648, where, and in the judgments the facts giving rise to the suit, the grounds of appeal, and also the authorities referred to, sufficiently appear :

The appeal came on for argument on the 10th and 13th days of February, 1882.\*

*Crooks*, Q. C., and *Bethune*, Q. C., for the appellant company.

*Hector Cameron*, Q. C., for the appellants Sampson and Buckley.

*C. Robinson*, Q. C., *McCarthy*, Q. C., and *Rae*, for the respondents.

June, 29, 1883. PATTERSON, J. A.—The plaintiffs, by their bill, pray that the defendant company and the two gentlemen who are joined as defendants may be restrained from prosecuting certain arbitration proceedings ; and that the appointment of the defendant Buckley by the defendant company, as arbitrator for the plaintiffs, may be declared illegal and null and void ; and that Charles M. DaCosta may be declared to be the duly appointed arbitrator of the plaintiffs.

This appeal is from a decree made in April, 1881, by Blake, V. C., in accordance with that prayer.

The questions arise under a clause in an agreement between the litigant companies which reads thus :

“ 13. If any dispute or difference shall arise between the parties hereto, concerning any matter or thing contained or referred to in or arising out of this agreement, it shall be referred to arbitration in manner following, that is to say : Each of the parties in difference shall, upon request in writing, appoint an arbitrator in New York, and the two arbitrators appointed by or on behalf of the parties respectively, and acting in the arbitration, shall, within ten days after the appointment of such one of them as shall be last appointed, appoint an umpire, who shall meet

\* *Present*.—SPRAGGE, C. J. O. BURTON, PATTERSON, and MORRISON, JJ. A.

the arbitrators in New York ; but if either of the parties in difference shall refuse or neglect to appoint an arbitrator for the space of ten days after being requested so to do by the other party, or shall appoint an arbitrator who shall refuse or neglect to act as such, then the arbitrator chosen by the party making such request shall appoint an arbitrator on behalf of the party who, or the arbitrator named by whom, shall refuse or neglect as aforesaid ; and the award of the said two arbitrators or of their umpire (as the case may be) shall be final and conclusive between the parties, and the submission hereby made shall be made a Rule of Her Majesty's Court of Queen's Bench in England ; and the arbitrators and their umpire shall have and exercise, as in Great Britain, all the powers and authorities given to arbitrators by the Common Law Procedure Act, 1854 ; and the submission hereby made and all proceedings thereunder or consequent thereon shall be governed and controlled, as, in Great Britain, by all the provisions of the said Act which are applicable to submission to arbitration and proceedings thereunder or consequent thereon."

A dispute having arisen between the companies, the defendant company appointed the defendant George G. Sampson as arbitrator, and by a written notice, given on 10th June, 1880, to Mr. Ward, an agent of the plaintiffs in New York, requested the plaintiffs to appoint an arbitrator in New York within ten days. This was done by the plaintiffs making, in London, the appointment of Charles M. DaCosta of New York, and telegraphing to him notice of his appointment on 19th June. Thereupon ensued some correspondence which has to be read in order to understand the exact nature of the contest.

It will be convenient for the sake of distinctness and brevity to speak of the plaintiffs as the Direct Company, and of the defendant company as the Dominion Company.

On the 24th June, 1880, Mr. Swinyard, the managing director of the Dominion Company, addressed the following letter to Mr. DaCosta:

" 18 FRONT STREET, TORONTO, 24th June, 1880.

" DEAR SIR,—The Direct United States Cable Company having on the 19th instant, through their superintendent, Mr. G. G. Ward, notified me by cable that you had been appointed to act as arbitrator for them in the

matters of dispute between our two companies, I on the same day telegraphed to Mr. G. G. Ward, suggesting that he should at once see to and arrange an early meeting with our arbitrator, Mr. G. G. Sampson, of 58 Pine street, New York, in order that you might immediately agree upon an umpire; and I also suggested to Mr. Ward that the first and second July next might be a convenient time for proceeding with the arbitration. If you have not yet met Mr. Sampson, you will kindly do so, and in order to arrange these preliminaries and fix an early day for proceeding with the arbitration, as an immediate determination of the matters in question is of vital importance to my company.

“Yours faithfully,

“THOS. SWINYARD, *Vice-President and Managing Director.*

“Charles M. DaCosta, Esq., 29 Nassau street, New York.”

On the same day, which was Thursday, Mr. Swinyard wrote from Toronto to Mr. Sampson informing him, as he also did by telegraph, of Mr. DaCosta's appointment, and requesting him to meet that gentleman. The letters were received in New York on Saturday, 26th June.

On Monday, the 28th, Mr. Sampson wrote to Mr. DaCosta :

“NEW YORK, June 28, 1880.

“MR. CHARLES M. DACOSTA, 29 Nassau Street, New York.

“DEAR SIR,—I have been advised by Thomas Swinyard, Vice-President of the Dominion Telegraph Company, that on the 19th of June the Direct United States Cable Company appointed you to act as their arbitrator, in connection with myself as arbitrator for the Dominion Telegraph Company, in certain matters of difference between these two companies. Will it be convenient for you to meet me to-day, and if so, at what time and place, in order that we may confer together?

“Yours truly,

“GEORGE G. SAMPSON, 58 Pine Street, New York.

This letter was handed to Mr. DaCosta while he was writing to Mr. Swinyard. He sent a verbal reply, which he followed by a written one, receiving however from Mr. Sampson in the interim this other letter:

“CHARLES M. DACOSTA, Esq.

“NEW YORK, 28th June, 1880.

“DEAR SIR,—In response to your verbal reply to my note, I beg to say it is important that we should meet to-day, as the time allowed for appointment of umpire will expire to-morrow night. Please inform me at what time and place I can meet you to-day.

“Yours truly,

“GEORGE G. SAMPSON, 58 Pine street.”

The letter to Mr. Swinyard was in these words :

“ JUNE 28th, 1890.

“ DEAR SIR.—I beg to acknowledge the receipt of your letter of the 24th inst. I have not yet received any formal appointment as arbitrator, nor do I know the terms under which the arbitration is to be held. I have only been advised by cablegram of my appointment, and that my commission has been mailed. Until its receipt I can take no steps, because I am entirely ignorant of the points of arbitration or the powers of the arbitrators, which will, of course, depend upon the terms of the arbitration clause, if any, in the contract between the companies. I have just received a letter from Mr. Sampson asking me to have an interview with him. I am about leaving town to be absent a couple of days, and therefore am obliged to postpone such interview until the day after to-morrow.

“ Yours very truly,

“ CHARLES M. DACOSTA.

“ Thomas Swinyard, Esq., Vice-President, Dominion Telegraph Company, 18 Front Street, East, Toronto.”

And that to Mr. Sampson in these words :

“ JUNE 28th, 1890.

“ MY DEAR SIR.—I was very much occupied when your messenger came with your note of to-day, and I sent a verbal message in reply. I now beg to confirm what I then said, viz : that I intend to leave town in the course of a few hours, to be absent until the day after to-morrow, and that on that day, at any time between ten and two o'clock, I shall be pleased to see you.

“ Yours very truly,

“ CHARLES M. DACOSTA.

“ George G. Sampson, Esq., 58 Pine Street.

“ P.S.—Since writing the above I have received your second letter. It is impossible for me to take any affirmative action in the matter at present as I am totally ignorant of the terms of the arbitration clause, as to the selection of an umpire, if any, or as to any other matter. I have only been advised by cable of the fact of my appointment, and that my commission would be mailed. Until it arrives you can readily see that I could not intelligently take any action.

“ C. M. DAC.”

To this Mr. Sampson replied by the following letter, which did not reach Mr. DaCosta's office until after he had left town :

“ NO. 58 PINE STREET, NEW YORK CITY, June 28th, 1890.

“ MY DEAR SIR.—Your reply to my communication of to-day has been received, in which you state that you will be absent from the city after a few hours until Wednesday, and that you are ignorant of the terms of the arbitration clause as to the selection of an umpire, if any, or as to any other matter, and that you have only been advised by cable of the fact of your appointment, and that your commission would be mailed. I beg to

enclose herewith a copy of the arbitration clause in the contract of date 25th of June, 1875, under the terms of which the appointment of yourself as arbitrator to act for the Direct Cable Company, and of myself to act as arbitrator for the Dominion Telegraph Company, has been made. The Direct Cable Company, No. 16 Broad Street, will be able to furnish you with the whole contract. You will observe that as your appointment was made on the 19th June, instant, the ten days allowed for the appointment of an umpire will be ended to-morrow, the 29th June. If you fail to act in the matter, as required by the terms of the contract, the responsibility must rest with yourself and the Direct Cable Company, as I am prepared to meet you at any time and place you may name, in order to agree with you upon an umpire. After the appointment of such umpire shall have been made we can, doubtless, then arrange for a meeting with him after the receipt by you of further information on the subject.

“Yours truly,

“GEO. G. SAMPSON.

“To Charles M. DaCosta, No. 29 Nassau Street, New York City.”

On the next day Mr. Sampson wrote again:

“NEW YORK, June 29th, 1880.

“MR. CHARLES M. DACOSTA, 29 Nassau Street, New York.

“DEAR SIR.—I am instructed by the Dominion Telegraph Company, in whose behalf I am acting as arbitrator, to inform you, acting as arbitrator for the Direct United States Cable Company (limited), in respect to certain matters of dispute or difference between the two companies above named, that if you shall refuse or neglect to act as such arbitrator by meeting with me and appointing an umpire within ten days after the date of your appointment, June 19th, 1880, I shall proceed in accordance with the provisions of the contract between the two companies to appoint an arbitrator in your stead. Personally, I very much regret the necessity for such notification to you, and I trust that you will detach all idea of discourtesy to you in any manner. The Dominion Telegraph Company desires this arbitration to proceed in the promptest manner possible, and to avail themselves of all the provisions of the contract to effect this result, and only wish to take such steps as will serve to protect their status in the premises.

“Yours truly

“GEORGE G. SAMPSON, 58 Pine Street.

“P.S.—I will be here until four p.m.

“G. G. S.”

Mr. DaCosta was still absent when this letter was received at his office. It was replied to by one of his partners, writing in the name of his firm, thus:

“JUNE 29th, 1880.

“DEAR SIR,—Your favour of yesterday, enclosing a copy of the arbitration clause in the agreement, was not received until after Mr. DaCosta had left his office, as he informed you he would in his communication to



you of yesterday morning. Under these circumstances it seemed impossible to do anything, as he could not be consulted or advised with. It has occurred to us, however, to prevent any failure of the provisions of the arbitration respecting the appointment of an umpire, that we should nominate an umpire on behalf of Mr. DaCosta, and we hereby nominate Mr. Francis T. Garrettson, of No. 26 Broad Street, a gentleman well-known in this city. Should this nomination be acceptable to you, Mr. Garrettson will be the umpire; but if it is not, nothing could be done until Mr. DaCosta's return to-morrow.

"Yours, very truly,

"BLATCHFORD, SEWARD, GRISWOLD & DACOSTA.

"George G. Sampson, Esq., 58 Pine street.

To whom Mr. Sampson returned the following answer:

NEW YORK, 29th June, 1880.

"MESSRS. BLATCHFORD, SEWARD, GRISWOLD & DACOSTA,

GENTLEMEN,—“I am in receipt of your note for this date, for which I beg to thank you. The provisions of the contract between the two companies, under the terms of which I am acting in the arbitration matter, require the two arbitrators to appoint an umpire. I am, therefore, compelled to decline to act upon the suggestion you have made.

"Yours truly,

"GEORGE G. SAMPSON, 58 Pine Street."

Mr. DaCosta, when he arrived in the city on the morning of the 30th, himself wrote again to Mr. Sampson:

"JUNE, 30th, 1880.

"GEORGE SAMPSON, Esq., 58 Pine Street.

"DEAR SIR.—I have just returned to the city, and find your various letters sent to my office after I had left it on the afternoon of June 28th. I have read a copy of the letter which my firm addressed to you yesterday, nominating on my behalf Mr. Francis T. Garrettson as the umpire. I now confirm such nomination as my act.

"Yours very truly,

"CHARLES M. DA COSTA."

This action was not concurred in by Mr. Sampson, who replied in these words:

"NEW YORK CITY, June 30th, 1880.

"CHARLES M. DA COSTA, Esq., 28 Nassau Street, New York City.

"DEAR SIR.—I am in receipt of your letter of this day, stating that you confirm a letter of your firm sent me yesterday, purporting to nominate Mr. Francis T. Garrettson as an umpire. The contract under which I am acting is explicit in its provisions. The suggestion of a nomination by your firm was not within its terms, and I have already taken action in the matter by appointing Thomas T. Buckley, Esq., of No. 33 Nassau Street, as arbitrator in your place, and I have notified the Direct United States Cable Company, and the Dominion Telegraph Company of such action.

"Yours truly,

"GEORGE G. SAMPSON, *Arbitrator*."

Upon 1st July, 1880, Mr. Da Costa wrote to Mr. Sampson protesting against the appointment of Mr. Buckley as illegal and unauthorized, and he sent a copy of his letter to Mr. Buckley.

On the same day Mr. Ward, the agent of the Direct Company, wrote the following letters to Mr. Sampson and Mr. Buckley, a notice of the appointment of Mr. Buckley having, on the day before, been given to him on behalf of his company:

“THE DIRECT UNITED STATES CABLE COMPANY (Limited),  
“16 Broad Street, New York, 1st July, 1880.

“TO GEO. G. SAMPSON, ESQ., 58 Pine Street, City.

“DEAR SIR.—Your favour of the 30th June, addressed to the Direct U. S. Cable Company (Limited), and the Dominion Telegraph Company, to the effect that you had appointed Thomas T. Buckley, Esq., as arbitrator on behalf of the Direct U. S. Cable Company (Limited), in consequence of the refusal or neglect, as you allege, of Charles M. Da Costa, Esq., to act as arbitrator on behalf of the said Direct U. S. Cable Company, was received late yesterday afternoon. Mr. Da Costa has not neglected or refused to act as such arbitrator, and has at all times, and now is, ready to act, and will meet you for the purpose of electing an umpire. and for all the purposes contemplated by the agreement between the two companies. I protest against your conduct as unwarranted by the said agreement, and, as I am advised by counsel, unauthorized by law, and you will be held responsible for all acts of yours to the prejudice of the Direct U. S. Cable Company (Limited.)

“I am, dear sir, yours truly,

“GEORGE G. WARD, *Superintendent.*”

“THE DIRECT UNITED STATES CABLE COMPANY (Limited),  
“16 Broad Street, New York, 1st July, 1880.

“THOMAS T. BUCKLEY, ESQ.,

“*Vice-President of the National Bank of the Republic, City.*

“DEAR SIR.—Late yesterday afternoon a letter was received by me at this office, over the signature of George G. Sampson, arbitrator, and addressed to the Direct U. S. Cable Company (Limited), and the Dominion Telegraph Company, Toronto, Ontario, to the effect that said Sampson had, on that day, appointed you as arbitrator on behalf of the Direct U. S. Cable Company (Limited), in place of Charles M. Da Costa, Esq., who is alleged in said letter to have refused or neglected to act as arbitrator for the said Direct U. S. Cable Company. Mr. Da Costa has never neglected or refused to act as arbitrator for the said Direct U. S. Cable Company, but has been at all times, and now is, acting as such for them. The pretended appointment of yourself as arbitrator for said company, by

Mr. Sampson, is wholly unwarranted by the contract between the aforesaid two companies, and, as I am advised by counsel, is utterly illegal. The said Direct U. S. Cable Company has protested, and now protests against these illegal acts of Mr. Sampson, and repudiates them; and I regret to have to notify you that should you assume to act as pretended arbitrator or the Direct U. S. Cable Company (Limited), you will be held personally responsible for all acts which may result to the prejudice of the said company.

“I am, dear sir, yours truly,

“GEORGE G. WARD, *Superintendent.*”

The next action taken was the appointment by Mr. Sampson and Mr. Buckley of the Hon. Enoch L. Fancher as umpire, on 1st July; notice thereof to Mr. Ward; and letters protesting against it addressed by Mr. Ward to Mr. Fancher and Messrs. Sampson and Buckley.

This is a summary of the principal facts stated in the bill; and for most of the purposes of the present appeal, it is a sufficiently full statement of the facts shewn by the evidence.

The bill was filed on 12th July, 1880. On the 23rd of the same month it was answered by the Dominion Company who defend the proceedings of their arbitrator as being strictly within the agreement. The following paragraph sets forth the grounds they rely on:

“While the plaintiffs allege in the said bill that on the 19th of June last they appointed Charles M. Da Costa, of the City of New York, as arbitrator on their behalf, if he were so duly appointed, which the defendants do not admit, and require the plaintiffs to produce any alleged instrument of appointment, and to prove the same. It, therefore, became incumbent on such two arbitrators, within ten days after the said 19th of June, to appoint an umpire under the terms of the said submission, and any refusal or neglect of either arbitrator to act in performing this necessary condition precedent to the valid exercise of their powers necessarily imposed the duty upon the other of them to appoint another arbitrator in his place. The said arbitrators, so appointed by the defendants and plaintiffs, respectively, had no legal capacity or power to extend or delay the time for appointing the umpire, or of waiving the strict performance of this condition, and when the said George G. Sampson, on the 28th of June last, was definitely

informed in writing by the said Charles M. Da Costa that it was impossible for him to take affirmative action at present, and the 29th day of June having expired without his having done so, it became the duty of the said George G. Sampson to exercise the power which thereupon rested upon him, and to appoint the defendant Thomas T. Buckley as arbitrator on behalf of the plaintiffs in the place of the said Charles M. Da Costa, which the said George G. Sampson lawfully did on the 30th of June last, of which notice was duly given to the plaintiffs and defendants, respectively, by the following instrument:

“ NO. 58 PINE STREET, NEW YORK CITY, June 30th, 1880.

“ THOS. T. BUCKLEY, No. 33 Nassau St.

“ DEAR SIR,—By the authority conferred on me as arbitrator under the agreements between the Direct U. S. Cable Co. (Limited,) and the Dominion Telegraph Company, dated 25th June, 1875, and 1st January, 1879, I hereby appoint you as arbitrator on behalf of the Direct U. S. Cable Co. (Limited,) in place of Charles M. DaCosta, Esq., of No. 59 Nassau Street, who was appointed by the said Cable Company, on the 19th day of June, inst., as their arbitrator, to act with me as arbitrator for the Dominion Telegraph Company, in respect of certain matters of dispute or difference between the two companies named, in accordance with the provisions of the agreements before mentioned, but who has refused or neglected to act as such arbitrator within ten days after his appointment. Be pleased to notify me of your acceptance.

Yours truly,

GEORGE G. SAMPSON, *Arbitrator*.

The position is thus distinctly taken that the failure of the arbitrator appointed by the Direct Company to act in New York within ten days of the day on which his appointment was made in London, in the appointment of an umpire, was such a refusal or neglect to act as arbitrator, within the meaning of the arbitration clause, as entitled and required the Dominion Company's arbitrator to substitute another person as arbitrator for the Direct Company.

In addition to this defence, the answer prays, by way of cross relief, that the Court may adjudicate upon the matters intended to be referred to the arbitrators. In support of this prayer the full agreement between the companies is set out, and a history given of the transactions out of which the dispute has arisen. No further

reference to this branch of the case is necessary, because the appeal from the decision of the Court below upon it has not been pressed.

Answers were also filed on 23rd August, 1880. by the defendants Sampson and Buckley.

The 35th paragraph of the plaintiffs' bill contained the following statement :

" 35. The plaintiffs have begun an action in the Supreme Court of the State of New York, and have obtained an interim injunction restraining the proceedings of the defendants, but the plaintiffs shew that the defendants, the Dominion Telegraph Company, are domiciled in this Province, and act through their officers and servants therein and thereout, and that it is necessary to obtain the aid of this Honourable Court in order to obtain full and effectual relief in the premises."

In the answer of the Dominion Company it is said (par. 21) that the two arbitrators Sampson and Buckley, (whose appointment of Mr. Fancher as umpire is alleged to have been duly accepted by that gentleman) had been delayed in proceeding with the arbitration by reason of the injunction obtained in the action in the Supreme Court of New York, and also by the interim injunction in this action ; and the New York action is further referred to in the 22nd paragraph, which reads thus :

" 22. The defendants shew that in the said action mentioned in the 35th paragraph of the bill, and commenced by the plaintiffs against the defendants in the Supreme Court of the State of New York, and in which the plaintiffs set forth the same matters and things, and prayed the same relief as in this bill, an order was made by the said Court on the 16th day of July, 1880, by which the injunction granted in the said action against proceedings in the said arbitration was dissolved upon the ground that the said Court had no jurisdiction in the said action, but the said order has since been appealed, and such proceeding is now pending."

The defendants Sampson and Buckley rely on the pendency of that action and on the fact that their domicile is the State of New York, as objections to the jurisdiction of

the Courts of this Province. The first paragraph in each answer is thus framed:

"1. It appears in and by the said bill that the several matters therein mentioned, as well as the relief thereby sought, are identical with the matters in question in the suit mentioned in the 35th paragraph of this bill, as instituted by the plaintiffs in the Supreme Court of the State of New York and now pending against the same defendants, and that any relief sought by the plaintiffs in the said respective suits against me is in respect of matters alleged to have been done by me in the said State of New York, and at the place of my domicile, and not in the Province of Ontario; and I therefore humbly submit that this honourable Court has no jurisdiction in the premises "

They base a further objection to the jurisdiction upon the reference in the arbitration clause to the English Common Law Procedure Act, 1854, this objection forming the subject of the second paragraph of each answer.

"2. It further appears by the said bill that the submission under which I became such arbitrator as in the said bill mentioned, was by the terms thereof set forth in the second paragraph of the said bill to be, and, it was mutually agreed upon between the plaintiffs and the defendants, the Dominion Telegraph Company of Canada, should be, made and become a Rule of Her Majesty's Court of Queen's Bench under the (Imperial) Common Law Procedure Act of 1854, and that the said submission, and all proceedings thereunder or consequent thereon, should be governed and controlled as in Great Britain by all the provisions of the said Act. Wherefore, I humbly submit and insist that any jurisdiction which this honourable Court might otherwise exercise in the premises has been ousted, and that the said Court of Queen's Bench has exclusive jurisdiction in respect of the said several matters alleged in the plaintiff's bill."

Then they each submit that the neglect of Da Costa to act, and the consequent power of Sampson to appoint Buckley, and of those two to appoint Fancher as umpire, appear by the bill; and they claim the same benefit of this objection as if they had demurred to the bill.

They assert the validity of what had been done by

Sampson, and allege that they have been prevented from performing their duties as arbitrators, owing to the proceedings in the action in the Supreme Court of the State of New York.

The arbitration clause is unfortunately so worded as to leave room for doubt as to its proper interpretation. It is to be regretted that the provision for constituting a tribunal with power to adjudicate upon rights of magnitude and importance had not been more explicit, particularly when it gave power, in certain circumstances, to one of the disputants in effect to appoint both arbitrators.

We have, however, to construe it according to the best of our judgment, and my consideration of it has led me to the conclusion that it has been mis-read on the part of the Dominion Company, and that that erroneous understanding of the clause has been the fountain from which the litigation has flowed.

I think it was a mistake to regard the appointment of the umpire as a duty which the arbitrator of the Direct Company was bound to take part in within ten days from his appointment, under the penalty of the vacation of his appointment and the accrual of the right to the other arbitrator to substitute his own nominee.

The clause contains, in the first place, the provision that each of the parties in difference shall appoint an arbitrator in New York, and these two arbitrators, acting in the arbitration, shall, within ten days after the appointment of the one last appointed, appoint an umpire who shall meet the arbitrators in New York.

Passing over for the moment the provision for the case of either party failing to appoint an arbitrator who shall act in the reference, we have here the whole direction which is given touching the arbitration, with the exception of such provisions of the English Common Law Procedure Act, 1854, as may be imported into the submission by the reference to that statute in the latter part of the clause. No time is fixed for entering upon the investigation of the matters in difference. Consistently with all the clause



contains, the arbitrators might enter upon the reference in three days, or not for three months, after their appointment. Let us suppose them to have entered upon it within three days, and that, while actively discharging his other functions, one of them should refuse within the ten days, or refuse altogether, to join in the appointment of an umpire. There is not a word in the clause to warrant the suggestion that the arbitrator so refusing would cease to be arbitrator. The appointment of the umpire within ten days was not essential to the validity of the reference. The failure to appoint within the time, or at all, might result from honest inability to agree upon the man, or from the man agreed upon declining the office, as well as from wilful or accidental neglect by one or both arbitrators. I take it that under section 14 of the Common Law Procedure Act, 1854, they might, notwithstanding the lapse of the ten days, still make the appointment; or under section 12, a Judge might make it.

I refer to the English Common Law Procedure Act, 1854, although it is not formally in evidence, because I understand it to be throughout treated as within the knowledge of the parties concerned and of the Court.

Then, reading the part of the clause under which the dispute arose, we find that if either party "shall refuse or neglect to appoint an arbitrator for the space of ten days after being requested to do so by the other party, or shall appoint an arbitrator *who shall refuse or neglect to act as such*, then the arbitrator chosen by the party making the request shall appoint an arbitrator on behalf of the party who, or the arbitrator named by whom, shall refuse or neglect as aforesaid."

It may be noticed, in passing, as an instance of the pervading looseness of this arbitration clause, that it does not require that the party requesting the other to appoint an arbitrator shall himself have first appointed one. The letter of the agreement would apparently be satisfied by his choosing his arbitrator only when he required him to exercise the penal power of appointing an arbitrator for his adversary.



The present question is: Did Mr. Da Costa refuse or neglect to act as arbitrator? It is not did he refuse or neglect to join in the selection of an umpire, although an act of that kind would doubtless have been an act done as arbitrator. Neither is it, did he refuse or neglect to act within ten days? The words simply are, "refuse or neglect to act as such."

The appointment of umpire within ten days was not, as I have just pointed out, essential to the arbitration. It was a directory provision only. Arbitrators are sometimes recommended, when there is no time limited, to appoint the umpire before their minds are embarrassed with the matters in difference, and it is usually a wise proceeding on their part to make the appointment before entering upon the reference. It is not unusual to make that a term of the submission. In this case the parties have not stipulated for so prompt an appointment; they have merely given the direction that, when each party appoints one arbitrator, the umpire shall be appointed within the ten days. Where both arbitrators are appointed by the one party, or rather by the party and his arbitrator, there is no time specified for the appointment of the umpire.

By *refusing* to act, I understand is meant declining to accept the appointment. It is the office of the word "neglect" to express failure to act after acceptance. There was no refusal to act in this case. Mr. Da Costa accepted the appointment. Then did he neglect to act?

Mr. Sampson proceeded on the assumption that a particular step had necessarily to be taken on or before the 29th of June, viz., the appointment of the umpire. If that assumption had been well founded the conclusion might be said to follow that, as the act was not done, it had been neglected. I am not sure that I fully apprehend how the reading of the contract contended for on the part of the Dominion Company is supposed to apply to the case, which may be put for the sake of argument, of an attempt made on 29th June to appoint an umpire, but failing by reason of honest inability to agree on an umpire, or to induce the

person agreed on to accept the office. In that case there would be no appointment within the ten days, and yet it would be somewhat straining the expression to charge either arbitrator with neglect.

But when we get rid of the idea of the essential importance of appointing the umpire on that day, and then bear in mind that no other time can be gathered from the contract, to which the "neglect" can be referred, in what way can Mr. Da Costa be properly said to have neglected to act as arbitrator?

A man cannot be accused of neglecting a duty unless he could have been reasonably expected to perform it. We have here a contract between parties, one of whom is in England, and which by its terms is to be performed partly in England and partly in New York. It is to be made a rule of an English Court. The documents and correspondence in evidence, as well as the tenor of the deed itself, shew the contemplation of all parties to have been that the formal appointment of the arbitrator for the Direct Company was to be made in England. His instructions or information touching the matters in difference and the terms of the reference had to come from England. This is what I take to have been in the contemplation of the parties to the deed. Had it not been for the mistake respecting the necessity for choosing the umpire within the limited time, it never would have occurred to any one that Mr. Da Costa could have been reasonably called upon to take any action until he received something more than the notice, conveyed by telegraph, that he had been appointed. There is no imputation of unnecessary delay in forwarding the papers from England, or of want of good faith on the part of Mr. Da Costa in desiring to receive them before assuming to do so important an act as he was asked to join in.

We should, in my judgment, be doing violence to the spirit and intention of the contract if we held that there was either refusal or neglect to act as arbitrator.

It may not be out of place to remark that some state-

ments in the evidence, particularly that of Mr. Swinyard, the Vice-President and Managing Director of the Dominion Company, can only be fully understood, and freed from what at first reading has an appearance of inconsistency, by remembering that although the proceedings are nominally those of the Dominion Company, yet another company, called the American Union Company, to which the Dominion Company's lines were leased, was also interested to a large extent, if not to the whole extent of the matters in dispute; and that Mr. Sampson was in communication with the managers of that company, whose head office is in New York, and acted under the advice of the legal advisers of that company.

Mr. Swinyard explains in his evidence that, after appointing Mr. Sampson as arbitrator, he left the construction of the arbitration clause and the decision as to what steps he should take to Mr. Sampson. From the other evidence we learn that while that was so, as far as Mr. Swinyard was concerned as directly representing the Dominion Company, the course pursued was decided on and the different steps taken under the advice I have mentioned. Indeed it appears from a dispatch which is in evidence, sent, I think, on the 26th June, from Mr. Swinyard to Mr. Bates of New York, that the counsel of the Dominion Company in Toronto did not take the same view which was acted upon in New York respecting the effect of failure to appoint the umpire.

The decree should, in my opinion, be affirmed, unless the objections to our jurisdiction ought to prevail.

Upon that subject I concur in the views expressed by the learned Vice-Chancellor, and I do not think I can usefully add much to what he has said.

Part of the argument for the Dominion Company was based upon the effect of the Statute 9 & 10 Wm. III. ch. 15, and of the Common Law Procedure Act, 1854, with reference to the agreement that the submission should be made a rule of Her Majesty's Court of Queen's Bench in England.

It happened that no such Court existed when the agreement was made, the Court of Queen's Bench having been merged in the High Court of Justice. That event took place on 1st November, 1875, when the Judicature Act of 1873 came into operation. The Direct Company, which is now the plaintiff, dates its existence only from 17th July, 1877. There had been another company of the same name with which, on 25th June, 1875, the Dominion Company made an agreement containing the clause before us. That Direct Company went into voluntary liquidation in July, 1877, and the present Direct Company was formed to take its place. The deed between the present or plaintiff company and the Dominion Company bears date 1st January, 1879. It recites, amongst many other things, that the new Direct Company contended that the agreement of 25th June, 1875, had been duly assigned to it by the liquidators of the old company, but that the Dominion Company disputed that contention; and then contains the agreement that the provisions of the indenture of 25th June, 1875, and of another indenture of 1876, are and shall be and remain binding on the Direct Company and the Dominion Company, in the same way as if those companies had entered into and made direct contracts with one another, containing the provisions of the said indentures, subject, nevertheless, to amendments and modifications then set out. One of the following clauses, more expressly adopting the original arbitration clause, reads thus:

“4. Any question or difference between the companies, parties hereto, arising out of or in reference to any matter, act or thing under these presents, shall be decided by arbitration, as and in manner provided for in the thirteenth clause of the said indenture of the twenty-fifth day of June, 1875.”

Thus the arbitration clause must be read as of the date 1st January, 1879, and it cannot, by any construction of the deed of that date, be made to relate to an earlier date than 17th July, 1877, long before which date there had ceased to be any Court of Queen's Bench in England.

This circumstance deprives the argument which was founded on the statute of William of most of whatever force it would have had. That statute would not, however, have helped the appellants. It relates to the setting aside of awards, and not to the earlier proceedings in a reference. Therefore, while it is true, as was pointed out by Mr. Bethune, that the Court of Chancery had, in recent times at all events, refused to entertain a bill to set aside an award when there was an agreement that the submission should be made a rule of Court, there was no foundation afforded by the statute for his contention that the same doctrine should be applied to the earlier proceedings.

This arbitration clause, though it failed to designate an existing Court, clearly evidenced an agreement that the submission should be made a rule of Court in England.

Under the 17th section of the Common Law Procedure Act, 1854, the submission could in the absence of any agreement, be made a rule of any one of the Courts. It would now be made a rule of the High Court of Justice, and the matter of the arbitration would be attached to one of the Divisions of the High Court: *Re Lomax's Arbitration*, 42 L. T. 391. It would not necessarily be attached to the Queen's Bench Division, unless it should be held that the parties intended to denote that Division under the name Court of Queen's Bench.

The Common Law Procedure Act, 1854, cannot, as I understand its provisions, be with any good reason relied on in support of the appellants' objection.

Under sec. 17, the submission might have been made a rule of any one of the Superior Courts of Law or Equity at Westminster. If that had been done, the result, under the same section, would have been that "no other of such Courts should have any jurisdiction to entertain any motion respecting the arbitration or award." This restriction applies only to "such Courts," and only after the submission has actually been made a rule of one of the Courts, which has not been done with this submission. Until made a rule of some particular Court, it seems that

some things, and amongst others the appointment under section 12, of an arbitrator or umpire, might have been done by any Judge of any of the Courts. Possibly, as that power is given to a Judge, it might be executed by any Judge even after the submission had been made a rule of one of the Courts. However this may be, it is clear that the mere existence of the power, whether by express stipulation or depending on the 17th section of the Act, to have a submission made a rule of Court, did not, by virtue of the Common Law Procedure Act, fetter the action of any Court in England even when the Superior Courts existed as separate tribunals. Thus the power asserted by the Master of the Rolls, in *Malmesbury R. W. Co. v. Budd*, 2 Chy. D. 113, to give relief similar to that decreed in the case before us, could, if I am not mistaken, have been exercised by the Court of Chancery, even though there had been an agreement that the submission might be made a rule of the Queen's Bench; or by the Chancery Division of the High Court, even if the agreement, (which had not been acted on) had named the Queen's Bench Division, and had by so doing precluded the parties, when making it a rule of the High Court, from attaching the matter to any other Division, as in *Re Lomax's Arbitration*, 42 L. T. 191.

Another objection is, the allegation of *lis alibi pendens*. I do not observe any reference to this in the judgment delivered in the Court below, and I do not understand from the answer of the Dominion Company that it was relied on as a defence. It is more distinctly made a point of in the answers of the other defendants, but by way of demurrer to the plaintiffs' bill.

I cannot see that, even if the question is properly before us on this appeal, there is any force in the objection as a defence to the action. It should come by way of an application to stay proceedings, or to compel the plaintiffs to elect between the two tribunals, whether made under the C. L. P. Act, R. S. O. ch. 50, sec. 72, or without reliance upon that statute. But upon the materials before us it would be impossible to say that, apart from the shape in

which the question is raised, any case for the interference of the Court with the present action is made out. One essential, as pointed out by Sir R. Phillimore in one of the cases cited to us, *The Mali Ivo*, L. R. 2 Ad. & Ec. 356, is that there is a *lis alibi pendens* before a tribunal which can afford the plaintiff a complete remedy. Now these defendants do not merely stop short of shewing that condition to be fulfilled by the action pending in New York; the point made by the answer of the company is that that action is resisted, and has so far been successfully resisted, on the ground that the New York Court has no jurisdiction in the matter.

I may refer to a case on this subject noted in the number of the Weekly Notes, which has reached me since I began to prepare this judgment: *Peruvian Guano Co. v. Bockwoldt*, W. N. 1883, p. 26, (23 Ch. D. 225.) It was an appeal from the refusal of a motion that the plaintiffs might elect whether to proceed with the action in the English or in the French Court. The action was brought for the delivery to the plaintiffs, an English company, of the cargoes of six vessels, or in the alternative for the payment of £100,000 damages, and for an injunction and receiver. As to the cargoes of five of the vessels, a concurrent action had been brought in France against the same defendants. In dismissing the appeal, Jessel M. R., is reported to have said: "It was very important that the Court should see clearly, in stopping an action, that no injustice was done. \* \* It was not vexatious to bring an action in each country where there were substantial reasons of benefit to the plaintiff. In the present case the defendants were resident and had large property in France. That was a good reason for suing them there. But further, the actions did not relate strictly to the same subject matter, and they could not be stopped because they were both brought under the same title. \* \* The plaintiffs were asserting their rights *bonâ fide*, and the Court ought to be slow to extend the doctrine with regard to double vexation."

I do not know that there is in England any statutory

power, such as that given by sec. 72 of our present C. L. P. Act, and which originated in 1866, under 29 & 30 Vict. ch 42.\* It had been doubted whether such a power could be exercised by the Courts. In *Cox v. Mitchell*, 7 C. B. N. S. 55; the Court of Common Pleas, in 1859, refused to stay proceedings in an action brought in England for the same cause for which an action between the same parties was pending in the United States, because there was no precedent for the application; although as the defendant had come to England and had there been arrested on a *capias* in that action, the Court would probably, in the exercise of its discretion, have refused the stay.

But whether such an application is entertained in the exercise of the inherent power of the Court to prevent its process being made use of vexatiously, or under the authority of the statute, the application is to the discretion of the Court, and is merely to stay, not to defeat the action. "Now the commencing of an action in one Court does not destroy the right of the party to commence an action for the same debt in another Court. The defendant may, indeed, plead in abatement the pendency of the former action, but he cannot plead it in bar."—Per Bayley, J., speaking of actions which were both in English Courts, in *Harley v. Greenwood*, 5 B. & Ald 101.

"The second plea in effect seems to amount to no more than *auter action pendante* in a foreign country, which is clearly not sustainable."—Per Wightman, J., in *Scott v. Lord Seymour*, 1 H. & C. 234.

It is scarcely necessary to remark that on no possible

\* Section 72 here referred, is as follows: "If any action is brought in any Court of law for any cause of action for which any suit or action has been brought and is pending between the same parties, and (or) their representatives in any place or country out of Ontario, such Court or any Judge thereof may make a rule or order to stay all proceedings in such first mentioned Court, until satisfactory proof is offered to such Court or Judge, that the suit or action so brought in such other place or country out of Ontario is determined or discontinued."



pretence could this objection be entertained in the way it is put forward by the defendants Sampson and Buckley, as a ground of demurrer to the plaintiffs' bill.

Another objection, which I think is the only one remaining for notice, is, that of the defendants Sampson and Buckley founded on their foreign domicile. I do not intend to enter into a discussion of this question, because it has been the subject of very full discussion and decision in the cases referred to by the learned Vice Chancellor, of *Grant v. Eddy*, 21 Gr. 45 & 568, and *Exchange Bank v. Springer*, 29 Gr. 270, and has been determined adversely to the present contention.

It may be that the action would have been sufficiently constituted without joining these gentlemen as defendants, but they are not improper parties.

I am of opinion that we must dismiss the appeal, with costs.

BURTON, J. A.—I think that the construction apparently placed by the defendants' Canadian counsel, originally on the clause of the agreement respecting the effect of a failure to appoint an umpire was the correct one, and that the omission to agree upon an umpire within ten days from Mr. Da Costa's appointment did not warrant the extreme step which Mr. Sampson was advised to take in the appointment of an arbitrator in Mr. Da Costa's place.

An agreement, the effect of which upon a certain contingency is to place in the hands of one of the parties in difference the power to select the whole of the arbitrators, should receive a strict construction, and we ought to be satisfied beyond all question that that contingency has arisen before giving such effect to it. One of those contingencies is, the refusal or neglect to appoint an arbitrator for the space of ten days after being requested so to do in writing by the other party, as to which no question arises, as Mr. Da Costa was appointed within the stipulated period; the other was, having appointed an arbitrator, the refusal or neglect of the person so appointed to act as such.

In the present case the arbitrator accepted the appointment, but as he had only been advised of it by cablegram, and was not personally cognizant of the matters respecting which his services as arbitrator were required, he intimated that he should not be willing to enter actively upon his duties until his commission and instructions were received, but he intimated that he was quite prepared in the interval to meet the other arbitrator and discuss the question of the appointment of an umpire.

Nothing could be more reasonable, and it would in my judgment be a most strained construction for a Court to place on such an agreement that there had been a refusal or neglect to act. If, looking at the nature of the differences likely to arise between two such companies, and the necessity of a prompt adjudication upon them, it was thought desirable that the umpire should be appointed at the earliest moment, and the arbitration actively proceeded with without any delay, that might have been provided for in the agreement, and the failure to appoint the umpire within a certain time made a ground for an *ex parte* appointment; but that has not been provided for, and as the arbitrator has not only not refused or neglected to act, but has apparently in the utmost good faith expressed his willingness to do so, and to proceed to discuss the appointment of umpire, I am of opinion that the subsequent appointments of arbitrator and umpire were ill advised and unwarranted giving rise to an enormous amount of litigation which might have been avoided if the matter had been considered in a calm and judicial spirit, as one would have a right to expect from persons assuming to act as arbitrators, although we find it unfortunately too frequently not to be the case in practice.

I agree with my brother Patterson on the other points which have been taken in the reasons of appeal, and in the view that the appeal should be dismissed.

SPRAGGE, C. J. O., and MORRISON, J. A., concurred.

*Appeal dismissed, with costs.*

## ALLAN v. MCTAVISH.

*Fraudulent conveyance—Conveyance for valuable consideration—Evidence—Statute of Elizabeth—Delaying creditors.*

D., the purchaser of land, in 1856, gave a mortgage thereon to A., the vendor, to secure part of the purchase money. Taxes were allowed to accumulate, for which the land was sold, and D. became the purchaser in 1868. In 1872, D. made conveyances of his other land and personal property to his two sons, each of whom gave back a mortgage to secure the maintenance of D. and his wife, and the payment of certain sums to other children. No claim was made on the mortgage given by D. until 1876, and the plaintiff, claiming as assignee of A., recovered judgment against D. in June, 1878, on the covenant. In the same year, in order to defeat this judgment, the mortgages made in 1872 to D. were released and new mortgages made to his wife securing substantially the same provision. The plaintiff having obtained a decree in the Court below to set aside the transactions of 1872 and 1878, as fraudulent against creditors, such judgment was reversed on appeal.

*Per* BURTON and PATTERSON, JJ.A., the transaction of 1872, upon the evidence, more fully set out below, was not fraudulent, for it was not voluntary, but brought about by pressure on the part of the sons, and was for valuable consideration; the mere fact, therefore, if it were shewn, of creditors being delayed, would not dispense with proof of intent to delay, &c., and there was no sufficient proof of such intent, either on the part of the father or sons, and certainly not on the part of the latter, which was essential, for the evidence went to shew that this debt, which was the only one, was neither known nor apprehended.

*Per* BURTON, J. A.—The allegation in the bill that the plaintiff was a creditor in respect of a debt existing before 1872, was not proved, for there was no sufficient proof of any assignment to the plaintiff, of which the judgment was no evidence, and a deed of the land by the mortgagee, A., to the plaintiff, would not operate as an assignment of the debt or of the mortgage; nor was it sufficient to shew the mortgage, and that the judgment was for the money secured by it.

*Per* PATTERSON, J. A.—Proof of the assignment was immaterial, for the plaintiff had judgment for the mortgage debt, and if the intent to defeat such debt had been shewn, the grantees of the land could not question the execution plaintiff's title.

THIS was an appeal from a decree of the Court of Chancery, pronounced by Spragge, C.

The suit in the Court below was brought by the plaintiff, who had obtained judgment against the defendant Dugald McTavish, in the Court of Queen's Bench, for the purpose of setting aside certain conveyances executed by the judgment debtor in favour of his two sons, Donald and Hugh.

The facts and circumstances of the case, as shewn at the hearing, appear in the report 28 Gr. 539, and in the judgments in this Court.

The defendants Donald McTavish and Hugh McTavish, alone appealed, and the appeal came on for argument on the 30th and 31st days of January, 1882.\*

*Osler*, Q.C., and *W. Laidlaw*, for the appellants, contended:—1. That no debt was proved against the appellants, inasmuch as they were strangers to the action in the Queen's Bench, and the exemplification of the judgment against their father Dugald McTavish, could not be read as evidence against them. 2. That the debt in question, if any, had been incurred by Dugald McTavish through a mortgage in favour of one Arnold, and that no assignment of this mortgage had been alleged or proved by the plaintiff. 3. That valuable consideration had been given and proved for the conveyances from Dugald McTavish to the appellants, and that no fraud had been shewn either against them or their grantor.

*S. H. Blake*, Q. C., *W. Cassels*, and *A. C. Galt*, for the respondent. In suits of this nature it has always been the practice of the Court to accept the exemplification of judgment as at least *prima facie* evidence of the debt. And this is in accordance with reason and justice; for it must be assumed that the Court, in giving judgment originally against the debtor, properly considered the case.

In this instance the debt is founded on a mortgage upwards of twenty years old, which is produced from the custody of the agent of the party entitled, who testifies that the plaintiff was entitled to an assignment, and he believes there was a formal assignment of it executed. The learned Chancellor, at the hearing, properly refused to allow the defendants to supplement their answer by setting up that no assignment had been executed—a defence which at the best was a mere technicality. The conduct throughout of Dugald McTavish was transparently fraudulent, for shortly after he had purchased the property he allowed it to be sold for taxes, and bought it in himself. Then followed

\* *Present*—BURTON, PATTERSON, MORRISON, J.J.A., and ARMOUR, J.

the conveyances of all his remaining property to his children, when he took back two mortgages in favour of himself and wife as the consideration. And as soon as judgment was about to be entered against him, these mortgages were discharged and new ones executed in favour of his wife alone, a transaction admitted by all the defendants in their answers to have been aimed wholly at the prevention of the recovery of this debt.

The cases relied upon by both sides appear in the judgments.

March 24, 1883. BURTON, J. A.—I think this case must be disposed of on the first objection' taken as to the status of the plaintiff, that the allegation in the bill that he was a creditor, or was in the position of a creditor in respect of a debt created and existing prior to the date of the impeached transaction in 1872, was not sustained by the evidence, and that as against him, therefore, that transaction ought not to be interfered with.

We need not, I think, be under any apprehension, as was suggested upon the argument, that in affirming the rule laid down by the learned Chief Justice of this Court, as to the effect of a judgment as regards third persons not parties or privies to the proceedings in which it was pronounced, we are unsettling the law, or establishing any new principle of decision.

The misconception arises from confounding the right to impeach a judgment with its effect in evidence. It is of course conclusive upon third parties equally as upon the defendant in the proceeding to establish the relationship of debtor and creditor, the amount of the debt, and the date of its recovery. Neither can a third party be heard to allege any defect or illegality which might have been urged by the debtor as a defence in the original suit, as, for instance, as was suggested upon the argument, that notes sued on were void for want of stamps. But whilst the judgment is conclusive and unimpeachable, and furnishes conclusive evidence of such a suit having been brought.

the recovery in it, and the date of its recovery, it furnishes no evidence whatever as regards third persons of any of the allegations in it on which the recovery proceeded. Those facts, if material to the plaintiff's case, have to be established by appropriate evidence.

To say that these parties are privies to the proceeding, as the conveyance impeached was made after the creation of the debt, is to assume the very question in dispute. If there was in fact no assignment to the plaintiff then these parties are in no way affected by it or the debt, which it is alleged was assigned by it. No admission made by the grantor after the making of the deed could affect his grantees; and it is difficult on principle to draw a distinction between such an admission and an assertion of a third party such as is made in the suit referred to, whether admitted by that same grantor or established in evidence against him.

But, in point of fact, on referring to the judgment there is no sufficient allegation of the assignment of the debt, nor any date to the assignment which is set out in the pleading.

We must therefore hold that the judgment referred to in this case did not establish that the debt sued on was contracted in 1856, or that the instrument creating it was duly assigned to the plaintiff.

I have referred to some authorities handed in by Mr. Galt, but they do not conflict with the rule I have been discussing. In one of these, *Harvey v. Wilde*, L. R. 14 Eq. 438, the question was, how far a judgment recovered against executors, who were also devisees in trust of the real estate, could be regarded as evidence against the parties interested in the real estate.

The Master of the Rolls held that the devisees were not bound by the judgment; but in an administration suit, which that was, he thought he had jurisdiction to decide on which side the burden of proof lay; and under the peculiar circumstances he held that the judgment ought to be *prima facie* evidence of the debt, the devisees being at liberty to disprove it if they could.

I should be inclined to doubt the statement made at the bar of the practice usually observed at the trial of adducing evidence only of the judgment, without giving independent evidence of the existence of the debt, or, at all events, of some debt in existence at the date of the impeached transaction, and still subsisting at the time of filing of the bill. As a usual thing the proceeding to impeach the transaction follows so immediately after its occurrence that proof of the judgment is all that is required. Such was the case in *Goldsmith v. Russell*, 5. De. G. McN. & G. 547, referred to by one of the counsel for the respondents. It appears from the language of the learned Judge that the transaction took place on the eve of the judgment being entered up.

The judgment then being no evidence in itself, how is the proof of the debt attempted to be established? It was contended by the learned counsel for the respondents that the case was aided by R. S. O. ch. 109; that this mortgage was found among the plaintiff's papers, was over thirty years old, and that it was *prima facie* evidence of the recitals, statements, description, and matters contained therein. But what is it at most evidence of?—merely of the fact which the learned Judge has found independently of the statute, that such a mortgage was in fact executed by the defendant in the original action; it does not establish the assignment; and I think it impossible to hold in the face of the deed from Mr. Arnold to trustees and from them to the plaintiff, conveying the absolute fee simple in this land to him, that any assignment was ever executed.

It was urged that a deed by the mortgagee, purporting to be an absolute conveyance of the land, operated as an assignment of the mortgage or of the debt secured by it.

It has been said in one case, *Jones v. Gibbons*, 3 Ves. 411, that the estate being absolute at law the debtor has no means of redeeming it but by payment of the money; therefore, he who has the estate has in effect the debt, as the estate can never be taken from him but by payment of

the debt; but in that case there was an assignment of the mortgage. All that was supposed to be wanting was a reference to and assignment of the debt, and the Court said "that it was difficult to say that the mortgage passes and is well assigned to one person, and yet the debt remains in another. It is impossible that it can be so divided. Therefore by the assignment of the mortgage that the debt necessarily passed as incident to it."

But it does not follow that a mere conveyance of the land has any such effect. Lord Mansfield, in the case of *The King v. St. Michaels*, Doug., 630, says: "A mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security," and that "it is an affront to common sense to say the mortgagor is not the real owner." The interest of the mortgagee before foreclosure is a mere personal chattel incident to the debt, and having no existence except in connection with it. In *Smith v. Smith*, 15 N. H. 63, the Court say, if the mortgagee can convey an interest by deed and still retain the ownership of the debt, then the interest in the land is not an incident of the debt, but is something which can be distinguished from and which has an existence independent of the debt. In such a state of things the interest in the land could be conveyed to one person and the property in the debt to another, which would be inconsistent with the principles recognized in a number of cases: and the Court therefore held that a conveyance of the land does not transfer the debt, because so long as a mortgage is considered as an incident to the debt it cannot pass without a transfer of the principal.

The conveyance in the present case from Arnold to the trustees makes no reference to the mortgage, and purports to be a conveyance of the lands in trust for sale; and the conveyance by them to the plaintiff professes to sell the land, and apart altogether from the question I am at present discussing, affords very strong confirmatory evidence that the mortgage formed among Mr. Arnold's papers was never in point of fact a mere security instrument.

Nor do I think the fact that the mortgage was never in point of fact a mere security instrument is supported by the



fact that the debt for which he has recovered has been identified as that evidenced by the covenant in the mortgage, and as being for the purchase money of the Acton lot.

I have referred to this in the commencement of my judgment, but as my brother Patterson seems to entertain a different view from that I have expressed I again do so.

As against Dugald McTavish, I think that all the material facts alleged by the plaintiff in the common law suit, which were indirectly admitted by taking a traverse on some other facts, the traverse having been found against McTavish, could not again be litigated between them, but became conclusive evidence against the then defendant.

But even if the grant of 1872 was shewn to be fraudulent as against the holder of that debt, how can the recovery of a judgment by a stranger to it, entitle that stranger to impeach it. The defendants say we do not, and the law does not allow us to dispute the recovery of a judgment against Dugald McTavish, but we are at liberty to say that, assuming even that there was a debt due by Dugald McTavish to Arnold in 1872, it has never been assigned to you. You may have recovered a judgment upon the pretence of being the holder of it either by collusion or through the neglect of the debtor properly to instruct his solicitor, or through accident, or by inadvertence.

I quite agree that as regards Dugald McTavish the plaintiff is entitled to execution against any property which was his at the time of the issue of the execution, or which was his previously and transferred with a fraudulent intent; but as long as the assignment of the debt remains unproved it must be immaterial as regards these defendants that Dugald McTavish has admitted it, which is as strong a case as is furnished by his omission to traverse it. Had it been traversed and found in his favour there would be an end of the case. These grantees have surely a right to say, assuming that such a debt existed, you, at all events, are not the holders of it, and the judgment is no evidence of it as against us, and granting that the holder of

that debt might have claimed to impeach the transaction you cannot ; for all that is shewn here that debt may have been satisfied.

It appears to me to have been clearly open to these defendants to raise all these questions, or to dispute that the mortgage ever became operative as a completed deed, and that the onus was on the plaintiff to establish his title, and that no amendment or supplemental answer was necessary, but that if it was necessary it is clearly a case in which the amendment should have been allowed ; but I entirely agree with my learned brother that the transaction of 1872 has not been successfully impeached, and that this appeal should therefore be allowed as to that transaction.

The parties have very properly submitted to have the releases and the transaction of 1878 set aside, but as this was only submitted to after the filing of the bill, the proper order to make is to direct those transactions to be set aside with costs up to the answer, and that as to the residue of this suit the bill be dismissed, with costs, and the costs of this appeal.

PATTERSON, J.A.—This action is brought against Dugald McTavish, Catherine McTavish his wife, his three sons, Donald, Hugh, and Peter, and his daughter Euphemia Kennedy. The bill of complaint was filed in 1880. Its prayer is (1) that certain conveyances entered into by and between the defendants as set out in the bill, were made and executed by the defendants for the intent and purpose of defeating, delaying, or hindering one John Arnold and the plaintiff in the recovery of a debt alleged to have been incurred by Dugald McTavish to John Arnold, and by him assigned to the plaintiff, and a judgment recovered therefor by the plaintiff against Dugald : (2) that said conveyances and instruments may be declared to be fraudulent and void as against the plaintiff, and may be set aside : (3) that the lands conveyed may be charged with the said judgment and the execution of the plaintiff,

and declared liable to be sold to realize the judgment and execution with costs, &c. (4, 5, 6,) For costs, accounts, and further or other relief.

The lands referred to are a farm of two hundred acres, consisting of two adjoining half lots of one hundred acres each.

The transactions attacked took place in 1872 and 1878.

In 1872 Dugald conveyed to each of his sons Donald and Hugh one hundred acres, Catherine barring her dower, reserving for the lives of the parents some rights as to residence and use of portions of orchard, garden, &c. The expressed consideration in each case was natural love and affection, an annuity agreed to be paid, and \$50. A mortgage was given by each son to the father and mother to secure their agreed provision, and to secure also the payment by each son of \$550. Donald was to pay \$250 of his amount to his parents or to his brother Peter within four years, and \$300 to the parents or to Euphemia, viz., \$100 within four years and the remainder within six. Hugh was to pay his \$550 to his parents or to Peter, one half within four, and the other half within six years.

This arrangement, regarded as merely a family settlement, and leaving out of view any question of creditors, clearly was, as it was described by his Lordship the Chief Justice, before whom, when Chancellor, the case was heard, as reasonable and sensible an arrangement as could well be made, looking at the ages of Dugald and his wife and the conditions of the family.

What was done in 1878 was the releasing by Dugald of the mortgages of 1872, and the making by Donald and Hugh of new mortgages on 25th March, to their mother.

Before this was done Peter had been paid the sums which he was to receive under the first mortgages, viz. \$250 from Donald and \$550 from Hugh, and Euphemia had also been paid by Donald \$200 of the \$300 designed for her, as is stated by Donald, by a turn with Peter to whom Euphemia's husband owed that sum.

The mortgages of 1878 secure to Catherine substanti-

ally what those of 1872 secured to her and her husband, Donald's mortgage in addition securing to Euphemia \$300 payable on 2nd April, 1878, which was the date at which the last payment of the \$300 fell due under the original mortgage; and Hugh's mortgage permitted Peter, while unmarried, to reside with his mother on the place.

The debt, which it is charged the defendants intended to defeat, is alleged to be a judgment recovered by the plaintiff against Dugald McTavish in the Court of Queen's Bench, on 12th June, 1878, for \$776.33 for debt and costs, "upon covenants contained in a certain mortgage made by the said defendant Dugald McTavish to one John Arnold, by whom the said mortgage was assigned to the plaintiff, and bearing date 24th November, 1856, whereby he covenanted to pay to your complainant the sum of £50 5s. and interest."

The defendants Dugald, Donald, and Hugh, filed answers, They all deny fraudulent intent in the settlement of 1872, and even knowledge at that time of the debt in question; and they all admit that the transaction of 1878 was made with reference to the claim of the plaintiff, and submit to have it annulled and the original mortgages restored.

The facts connected with the transaction out of which the alleged debt is said to have originated have been the subject of a good deal of the discussion before us. I do not think too much importance has been attached to them, because they have, in my estimation, a material bearing upon the question of the intent to be attributed to the parties to the conveyances of 1872. It will therefore be proper for me to refer, at some detail, to those facts, or rather to such evidence as we have before us relating to them, for it is certain they are not fully shewn.

Dugald McTavish became the purchaser of a village lot in Acton, at an auction conducted by one Roe an auctioneer, on 1st November, 1856. One of the handbills announcing the sale is produced. In it Roe informs the public that he has received instructions from Lachlan McDonald, Esq., to sell by public auction, on 1st November,

certain chattel property which he enumerates, including nine horses, some cattle and sheep, waggon, sleighs, harness, &c., and other unenumerated articles, *also, twelve town lots in Acton*. Then follows a glowing description of the prospective value of the lots from their situation, the certainty of Acton being the site of the junction of a railway from Owen Sound with the Grand Trunk, and other advantages, to which is added: "Terms of sale. For the lots, one-quarter down, or on approved notes at one month, balance in four annual instalments, with interest. Deeds given on the first payment, and the balance secured by mortgage. For the other property," &c., &c.

The lot bought by Dugald was No. 42, the price £67. He paid McDonald £16 15s., being one-fourth of the price, and produces McDonald's receipt, dated 6th November, 1856.

By the terms of sale Dugald was entitled to a conveyance of the lot, he securing the payment of the balance, or £50 5s., by mortgage.

It was the fact, though it does not appear to have been disclosed at the time of the sale, that the lots, or at all events lot 42, for we have no precise information about the other eleven, belonged to John Arnold. It is not suggested that Arnold was interested in the chattel property advertised and to be presumed to have been sold at the same auction. Whether or not McDonald had any prior authority from Arnold to sell the lot is a matter of conjecture and inference. The evidence is all derived from what afterwards occurred, and may be said to preponderate in favour of the existence of the authority, but it is not all in the one direction.

We have then a document produced, which is relied upon as the deed containing the covenant on which the judgment was recovered against Dugald. It is a mortgage prepared, as seems sufficiently indicated, at the instance of McDonald. It is from Dugald McTavish to John Arnold, securing payment of £50 5s. in four instalments of £12 11s. 3d. each, payable on 24th November, 1857, and three following

years, each instalment bearing interest from 24th November, 1857, which may be a clerical error for 1856. The date 1856 is filled in at the head of the printed form, but the day and month are left blank. For the Christian name of Dugald's wife, who was to bar her dower, there is also a blank. The deed is signed by Dugald McTavish, who also signs the receipt at the foot acknowledging payment of £50 5s., being the expressed consideration money. This receipt is signed by Kenneth Grant as witness, but he does not sign as attesting witness to the signature of McTavish to the deed itself. The document is in the shape one would expect to find it in case the signature of the one party were obtained provisionally, and pending something necessary to the completion of the transaction. The absence of the signature of the witness to the deed would not by itself necessarily suggest anything further than that he deferred the writing of his name until the wife should come in and execute the deed; but if that were all, there was no occasion to leave the date blank. On the other hand there is a date fixed for the payments and for the computation of interest, viz., 24th November. We have nothing whatever before us to explain why this date was fixed. By the terms of the sale, interest should have run from the 1st of the month. If the date of the payment of the first instalment, at which date the purchaser was entitled to his deed, governed the payment of the interest, the date should have been 6th November. The 24th had no relation to the actual making of any deed by Arnold; and, to render any guess still more uncertain, the date written in the mortgage itself, as that from which interest was to run, is 24th November, 1857, a year a-head.

We are not told in whose handwriting the mortgage is, whether that of Kenneth Grant who attested the receipt, or of what other scribe. It is not written by McDonald.

Kenneth Grant is said to be dead. I infer from the few words said about him in the course of Dugald McTavish's evidence, that he lived at Acton. This inference, as well as the inference that the mortgage was prepared at the

instance of McDonald, is supported by another thing which appears on the face of the mortgage. The description of the land, as originally written, was, "Lot number forty-two, according to the plan of the village of Acton filed in the registry office of the said county of Halton." The correct description would seem to be, lot No. 42 in Block No. 9. Accordingly we find all the words from the word, "according" cancelled by running a line through them; and then, below them, in an irregular space which was left by the lines drawn to fill up the blank between the written description and the next printed portion of the deed, the fuller description is inserted, viz., "in block number nine, according," &c. A comparison of this handwriting with the receipt of 6th November makes it palpable that the correction was made by the hand of McDonald himself. That it was made after McTavish had signed the document seems a fair inference from all that we see, viz., the absence of any note of the alteration in the attestation; the attestation being in a different hand and in different ink from the original, whereas the ink of the signatures of McTavish and Grant corresponds with that of the body of the deed; and the fact that the memorial which is produced unregistered, and which was signed by McTavish and witnessed by Grant, has the original description unaltered.

McDonald seems not to be accessible as a witness. He is said to have left Acton some time after this transaction; and then, after living a couple of years at the village of Lucknow, to have gone to the United States. Dugald McTavish himself throws no light upon the history of this instrument. He asserts that he has no recollection of signing it; and in fact when it was produced on the occasion of the common law suit, he denied that the signature was his. That fact was found against him, and in the present case the learned Chancellor came to the same conclusion upon the evidence. But though it is established that he did sign the paper, as we must take it to be, his assertion of want of recollection of the matter has very strong support, not only from circumstances to which I have to

refer, touching the Arnold side of the transaction, but from a letter which is now produced by the plaintiff, and which was written to a Mr. Knight by Dugald, on 2nd November, 1857. I shall notice this letter more particularly when I come to its date in tracing the history along.

We have no direct evidence of any communications which passed between McDonald and Arnold.

Dugald McTavish says that he found out from one Stewart, a teamster of McDonald's, that the land did not belong to McDonald, but to a man in Toronto, to whom he then wrote, and from whom he received a reply, the effect of which he states in terms, which shew that he refers to a letter which he produces, from Mr. Arnold, dated 9th January, 1857. No such letter as that which he says he wrote is produced. It is suggested by Mr. Osler that it was the letter of 2nd November, 1857, to Knight, to which Arnold replied on 9th January, 1858, making the natural mistake of writing 1857, in the place of 1858, as the date. The date, as written, is, as far as it goes, against that theory, and neither does Mr. Arnold's letter nor that of McTavish to Knight fit in with it.

McTavish, of course, may have written to Arnold as he says, although the letter is not forthcoming; but Arnold's letter is not framed as a reply to such a communication. If McDonald informed McTavish at or soon after the sale that the land was Arnold's, which would be the natural inference from his procuring McTavish's signature to the mortgage, one does not understand how McTavish's first information came from Stewart. This is one of the things which are not clearly made out. Does McTavish now, from either intentional perjury or mistaken recollection, dishonestly or honestly, but still incorrectly, tell us that that was the case, or is it true that he does not recollect, because he never understood, that he was executing a mortgage to Arnold, or a mortgage to any one? This is a question as to which I prefer to suspend my judgment for the present.

On the 9th January, 1857—I adhere to the date as written—Mr. Arnold writes the following letter :



TORONTO, 9th January, 1857.

"SIR,—I learn from Mr. McDonald of Acton that you were the purchaser of lot 42 of mine, at Acton. I am ready to give you a deed on payment of the 1st instalment, and take a mortgage for balance; but as the amount is small, if you were disposed to pay the whole down I would allow a discount of 8 per cent. I beg to say that Mr. McDonald has no authority from me to receive money on my account. Please address me here.

"I am, Sir, yours,

"JOHN ARNOLD.

"To Mr. Dugald McTavish, of Nassagaweya."

Upon the receipt of this letter, McTavish says he went to McDonald to demand back the money he had paid him, but McDonald set him at defiance, telling him to sue him if he chose, that he was not worth £5, or else he would have been in gaol as a debtor, or something to that effect.

From this we may take it that McTavish was satisfied at that time that McDonald had not accounted to Arnold for the money; and we may therefore assume that to be the fact.

Then we have, as the next event in the order of dates, a deed executed by Mr. Arnold, purporting to convey lot 42 to Dugald McTavish. It bears date 16th July, 1857, and was executed about that time, as appears from the fact that the affidavit of execution was made on 7th August, 1857. The memorial, on which the affidavit is endorsed, was also executed by the grantor. The witness who makes the affidavit is Walter Arnold of Toronto. Whether or not he could throw any light on the history of the deed, or whether he could have been produced, does not appear.

There is room for the inference that this deed was drawn in consequence of some communication from McDonald to Arnold, and possibly after McDonald had sent to Arnold the inchoate mortgage, for we find the description of the land in the deed agrees with the description, as amended by McDonald, in the mortgage.

Then comes McTavish's letter of 2nd November, 1857 :

" ACTON, November the 2nd, 1857.

" MR. KNIGHT,

" SIR.—If you would please to send the deed up to the Clerk of the Court, I would get him to make out the mortgage for the balance of the money on the town lot that I bought of Mr. Arnold of Toronto, and the Clerk of the Court can send you the mortgage. I did not know that you were going to leave the station or I would have attended to it sooner; the next payment is ready as soon as due.

" Yours truly,

" DUGALD MCTAVISH."

I cannot find any information in the evidence respecting Mr. Knight, who he was, or where he is, or why he was not called by some of the parties. He is stated by counsel to have been Arnold's agent, and I suppose he must have acted in that capacity. That would explain the production by the plaintiff in the present suit of this particular letter. Possibly Knight could have told us whether he had conveyed word to McTavish that Arnold had executed the deed. Obviously he had not reminded McTavish that he had already executed a mortgage which required only his wife's execution to complete it; and, as obviously, McTavish intimated to him, and through him to Arnold, that he was not aware of the existence of any such document.

From that time, in November, 1857, until December, 1876, a period of over nineteen years, there is no pretence of any communication from Arnold or any one on his behalf or claiming under him with McTavish. It might have been conjectured that this at first arose from Arnold's estate having passed out of his hands into those of trustees for his creditors as well as for himself, just before November, 1857, were it not that the actual management seems not to have changed hands; but, whatever was the reason, the fact remains.

Mr. Whitney, who gave evidence, managed the estate for the trustees, and had acted as agent for Mr. Arnold himself, and he afterwards acted for the plaintiff. But the

matter did not come into his hands until it had assumed the position I have attempted to describe, and his evidence adds nothing by way of elucidation to the history. In December, 1876, he or his firm of Whitney & Morton broke the long silence by writing to Dugald McTavish, whose answer, written on 9th December, 1876, was that he had never given a mortgage to John Arnold or any other person on lot 42.

The plaintiff claims to be a creditor of Dugald McTavish, as assignee of the covenant contained in the mortgage. There has been much argument addressed to us on this topic, and I may, further on, have something to say about it. Whatever title the plaintiff has accrued to him no earlier than April 1875, when he received from the trustees a conveyance of certain lands, including this lot 42. I desire at present to confine my consideration to the state of things in 1872, and to inquire whether the conveyances of that date have been successfully impeached. I refer, therefore, to the trustees' dealings of 1875, not for the purpose of discussing the legal effect of their deed, as possibly entitling the grantee of the land to bring a personal action for a debt which happened to be secured by a mortgage upon the land they conveyed, but as some evidence of the light in which those who managed the estate regarded the McTavish matter. With it I class some more of what is in evidence, viz., that the mortgage was allowed always to remain uncompleted: that it and the deed of June, 1857, were both allowed to remain unregistered: that the letter of McTavish to Knight was never answered by act or word: that Arnold's demand of 9th January, 1857, for the full purchase money was never withdrawn or modified; and yet the mortgage which the plaintiff sets up, but which neither Arnold nor his trustees ever attempted to set up against McTavish, is one which concedes the validity of the payment to McDonald, inasmuch as it is for the balance only.

Then, in connection with the inactivity on the Arnold side, we must remember how McTavish treated the matter

For a while he paid taxes on the lot. Then he ceased to pay taxes. He says he did so when he found he could not get a deed from Arnold, and could not get back his money from McDonald. After a while the lot was sold for the taxes, and McTavish bought it. The sale was on 24th March, 1868, and he received a deed from the warden and treasurer on 3rd May, 1869.

It may be added, as a fact not unworthy of notice when we have to form an opinion respecting good or bad faith which actuated the settlement of 1872, that it would not have been unreasonable on the part of McTavish to consider that Arnold could not in fairness adopt and enforce the sale made by McDonald, and yet repudiate the payment of the cash instalment, which was paid to McDonald in compliance with the literal reading of the terms of sale.

Let us now fix our attention upon the transaction of 1872, and putting ourselves as far as we can in the place of those concerned in it, enquire, was it entered into with intent to delay, hinder, or defraud any creditor of Dugald McTavish? This is a question of fact. It can become a question of law only when to certain ascertained facts the law attaches a significance which governs the conclusion. In that sense I understand the expression of Lord Mansfield, in *Worseley v. Demattos*, 1 Burr., at p. 474, when he said: "Whether a transaction be fair or fraudulent is often a question of law. It is the judgment of law upon facts and intents."

"In the application of the statute," says Mr. Benjamin, in his work on Sales, "a question of fact for the jury is constantly presented, namely, whether the transfer of the goods was *bond fide*, or fraudulent, that is, with the end, purpose and intent to delay, hinder, or defraud creditors, as the Act expresses it. It was indeed held in some early cases, of which the leading one is *Edwards v. Harben*, 2 T. R. 587, that under certain circumstances this was a question of law for the Court. \* \* Apart from this very exceptional case the authorities are all in accordance in

treating the question of *fraus vel non* as one of fact for the jury, even where the vendor remains in possession." *Benjamin on Sales*, 4th Am. ed., p. 639.

Many dicta to the same effect may be found in recent cases. Thus Sir R. T. Kindersley, V.C., in *Thompson v. Webster*, 4 Drew. 228. I quote from the report in 5 Jur. N.S. 668: "The Court or jury has to decide each particular case by its circumstances; but not being able to fathom a person's mind we must judge by his acts connected with the surrounding circumstances."

When that case was before the House of Lords, the Lord Chancellor, Lord Campbell, said, (7 Jur. N. S. 531): "We are called upon to lay down a rule upon this subject, and I, for my part, am prepared to lay down the rule as it was laid down by Sir R. T. Kindersley, V.C. \* \* The Court has to decide in each particular case, whether, under all the circumstances, we can come to the conclusion that the intention of the settlor in making the settlement was to delay, hinder, or defraud his creditors. That, I say, is the rule which I suggest for your Lordships' adoption." "The question is," said Sir Wm. James, V. C., in *Ware v. Gardner*, L. R. 7 Eq. 317, "whether by this deed he could have had any other intent than to delay and hinder his creditors." "Were this case absolutely free from authority," said the same learned Judge, in *Freeman v. Pope*, L. R. 9 Eq. 206, "I should have thought that the question I had to put to myself under the statute was, in the words of the statute, whether there was actually any intention by this settlement on the part of the settlor 'to defeat, hinder, or delay his creditors.'" The principal authority alluded to was the case of *Spirett v. Willows*, 11 Jur. N. S. 70, 3 D. J. & S. 293, in which Lord Westbury, when Lord Chancellor, had formulated some doctrines on the subject, which James, V. C., criticized, concluding his judgment by saying: "That is the decision of Lord Westbury. I am bound by that decision; and therefore, although bound to express my extra-judicial opinion that this gentleman, having regard to his income and his means, had no intention whatever to

cheat his creditors at that time, I must judicially declare this settlement to be fraudulent and void as against his creditors." In the Court of Appeal (L. R. 5 Chy. 538,) Lord Hatherley, L. C., and Sir G. M. Giffard, L. J., while they took a different view of the facts from that taken by the Vice-Chancellor, agreed with him in disapproving of Lord Westbury's formulæ. The Lord Justice used this language: "In this case I quite agree with the Vice-Chancellor in thinking that if the propositions laid down in *Spirett v. Willows* are taken as abstract propositions, they go too far and beyond what the law is; but if they are taken in connection with the facts of that case, then undoubtedly there is abundantly enough to support the decision. \* \* That being so, I do not think the Vice-Chancellor need have felt any difficulty about the case of *Spirett v. Willows*, but he seems to have considered that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved, that is, in such cases as *Holmes v. Penney*, 3 K. & J. 90, and *Lloyd v. Attwood*, 3 DeG. & J. 614, when the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways."

In *Kent v. Riley*, L. R. 14 Eq. 190, Lord Romilly, M.R., is reported to have said that, as had often been observed in these cases, it was impossible to penetrate into a man's mind and ascertain what his intentions were; the facts could only be looked at in order to ascertain what inference could fairly be drawn as to the intention of the settlor.

Lord Justice Giffard, in *Alton v. Harrison*, L. R. 4 Chy. 625, quotes the language of Vice-Chancellor Stuart in the same case, as laying down the law quite accurately and in accordance with a long course of authorities, when his Honor said: "In this, as in all other cases of the same kind, the question is as to the *bona fides* of the transaction. If the deed of mortgage and bill of sale was executed by

Harrison honestly, for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his personal benefit, it is not void, but must have effect."

The same rule may be traced as governing the decisions in many other cases. Indeed, as is remarked in a note on page 13 of *May on Fraudulent Conveyances*, the principle is to be collected from a general survey of all the authorities, rather than by any express *dicta*.

The only debt which can be in the slightest degree hinted at in connection with the alleged intent, is the purchase money of the Acton lot. Such other debts as existed, if any, were merely trifling matters inseparable from ordinary housekeeping, or the price of some farming implements, and all these were, either by express or tacit understanding, paid by the sons Donald and Hugh.

As far as Dugald, the father, is concerned, the judgment recovered by the plaintiff, either by itself or in connection with the evidence which goes to identify the deed declared upon with the mortgage signed by him in 1856, proves that he owed the alleged mortgage debt.

As against the sons, the judgment was, as I understand the law, evidence that their father was, as soon as that judgment was recovered, a debtor to the plaintiff for the amount recovered; and that the plaintiff had recovered the judgment for money which he alleged that Dugald had, in 1856, covenanted to pay John Arnold; but it was not evidence of the truth of that allegation or of any other fact.

To explain the grounds of this opinion would be merely to repeat what has been said upon that subject by the learned Chancellor, with all of which I agree.

It is shewn, however, by other testimony, that the sons were aware of the purchase of the lot, and of the payment to McDonald, and that nothing more had been paid to Arnold. They also knew that their father had never received a conveyance from Arnold. They knew of the re-purchase of the lot at the tax sale; and, generally, we may take it that, no secret being made in the family of

whatever was done, the motive for the purchase at the tax sale was known to them, as now explained to us by their father, viz., because he could neither get a deed from Arnold nor his money from McDonald. They undoubtedly also knew that for fifteen years no word had been heard from Arnold or any one claiming from him, with respect to the lot. There is not the slightest reason to suppose they had ever heard of the mortgage, and they deny all knowledge of it.

To imagine that, as a matter of fact, this debt was in their contemplation when they entered into the arrangement in 1872, would be to draw an inference not only improbable in itself and unsupported by affirmative evidence, but opposed to whatever direct evidence upon the subject there is. It is true that we find in the examination of Hugh, taken before the Master, expressions to this effect: "It was known to the family that my father had bought the Acton lot; and we knew there was something to pay on it; we did not understand there was to be any interest; the price was about \$300, and he paid at time of purchase about \$75 to \$100, and we knew the balance was owing." And counsel, taking this statement as a basis for further examination of the father and both the sons at the hearing, pressed them with questions touching the debt so spoken of as "owing," but with the result of making plain what already sufficiently appeared, that all that was meant by Hugh was that he was aware of \$75, or thereabouts, having been paid, and of the balance of the price never having been paid.

If we are to disbelieve the sons' denial of this unpaid purchase-money having been in their contemplation, and are to suppose it to have been present to their minds as a debt once owed by their father notwithstanding the fact that he never received a deed for the land, we cannot reasonably refuse to credit them with an apprehension of its position, as they must on that hypothesis have regarded it, always bearing in mind that they knew nothing of the mortgage. It would be, to their apprehension, a simple con-



tract debt fifteen years old, or eleven years old counting from the time named in the conditions of sale for the payment of the last instalment. To suppose them to have entertained any idea of providing against danger from such a debt, would be opposed to common experience as well as to the evidence.

Besides all this, when we speculate upon what may have been in the minds of the McTavish family, we may not inappropriately ask ourselves the question, what did the creditors think of the matter? A creditor may, no doubt, be fully alive to the fact that a debt is due to him, while his debtor may think little about it; and persons dealing with the debtor may never hear of it. But if we find the supposed creditor oblivious of the debt, it is asking a good deal to expect us to attribute a constant recollection of it to others.

If I had, upon the evidence before us, to find whether John Arnold or any one who conducted his affairs or the affairs of his estate supposed, at any time prior to the year 1876, that any such debt as that now in question existed, I should without hesitation find in the negative. As I have already remarked, we have no evidence from any one who can speak of the original transaction. What evidence we have stops short of connecting Arnold with the mortgage as accepting it, and on the contrary it leans the other way. It shews in the clearest manner, namely, by the writing of Arnold himself, that the mortgage was not originally made in privity with him, and that it was part of a transaction by which, as late as 9th January, 1857, he refused to be bound. When, therefore, we understand, as we do from the evidence, that those dealing on the Arnold side were business men: that the object of the trust and of the management of his estate was to pay debts which he owed: that Dugald McTavish was always accessible, never changing his abode, and always in good circumstances: and that in all these years, while one instalment after another was falling due, and for sixteen years after the maturity of the last of them, no application

was made to him, although the document now put forward was all that time in their possession and was neither forgotten nor mislaid—it is to my mind simply incredible that such a debt was ever supposed to exist.

If any doubt of this could be entertained, it would be removed by remembering that when the trustees conveyed to the plaintiff they did not profess to assign the mortgage or the debt, but conveyed the land.

It could be only in obedience to some imperative rule of law, or upon reasonably clear evidence, that we could be asked by persons claiming a debt with such a history to attribute to the parties to the settlement, or at any rate to the sons whose case I am more particularly considering just now, not only a knowledge of the debt, but an apprehension of its being enforced, and a design in what they did to defeat it.

I know of no such rule of law, and certainly there is no such evidence.

Then as regards Dugald, the father, the case is not, in my opinion, materially different. He is of course concluded by the judgment from denying, not only that he signed the mortgage, which is otherwise established as a fact, but that it became his deed and created a specialty debt due by him to Arnold. But upon the question whether, at the time of the settlement in 1872, he regarded it as a living debt, and made the settlement with intent and design to defeat it, most of the considerations are applicable to which I have adverted.

The grounds on which the learned Chancellor came to a conclusion adverse to Dugald upon this point, appears from a passage which I shall read from his lordship's judgment. After referring to the character of the settlement, as including a distribution between the sons of farm stock and implements as well as of the farm itself, he said:

“What he retained for himself was two milch cows, four sheep and one horse. I have no evidence of their value; probably \$150 would be the outside value. His retaining these, and I suppose some furniture, is some evidence tend-

ing to negative an intent to defeat his creditor, Mr. Arnold. These things were, however, to be kept on the premises along with the stock of his sons. The particular things were not identified nor distinguished from the other cows, sheep, and horses kept on the farm by his sons, so that it would be very difficult for a creditor to realize, in execution, anything as the chattels of Dugald. What was withdrawn from the reach of his creditors was tangible; what was reserved would be reached with difficulty if at all. I can come to no other conclusion than that what was done, was a hindering and delaying of creditors—of Arnold certainly, and of others if not paid by the sons; and as that was the necessary effect of what was done, I must hold that it was done with that intent.”

His lordship had, shortly before, referred to the retention of the Acton lot by Dugald, who had not paid Arnold for it, although he had paid the £16 15s. to McDonald and had purchased the lot again for taxes, and although it had always been an unprofitable possession; and had characterized the dealings of the McTavishes about it as simply dishonest. I am not going to discuss the question whether, in regard to the whole affair, Dugald was more sinned against or sinning. What I wish to notice is, that, in mentioning the assets of Dugald exigible for debts after the settlement, his lordship for the moment overlooked this lot. Its existence was an important fact, as being consistent with the good faith with which the settlement was made, the father shewing no intention or design to divest himself of his property for the purpose of putting it out of the reach of creditors, but only parting with the farm and what concerned the farm, and doing this by way of making a settlement which is not open to the charge of being in any respect inappropriate to the circumstances of himself and his family, or as calculated to suggest any design but what appeared on its face. The Acton lot was by no means lost sight of, because provision was made for one of the sons aiding in fencing it, &c., in case the father should decide to build upon it.

Again, if we charge Dugald with the knowledge, as present to his mind, of this debt as a mortgage debt, we

are bound to let the fact of its being a mortgage debt have its weight on the question of the fraudulent intent. In *May* on Fraudulent Conveyances the following propositions are deduced from authorities cited : 1st ed., p. 141 : "Mortgagees, therefore, who have a specific portion of land set aside, and, so far as their interest is concerned freed from liability to the general debts, and to which they can, primarily at least, resort for satisfaction of their claim, are not to be regarded as 'creditors,' or at least a mortgage debt is not, properly speaking, a debt for the purposes of the statute; but there seems at one time to have been some uncertainty on the point, and some confusion as to whether mortgagees are to be looked upon as creditors under this statute, or as purchasers under the later one; if, however, the property mortgaged is not sufficient to satisfy the debt, the mortgagee, of course, will be a creditor for the balance."

I am not able to find from the evidence that the *necessary* effect of what was done was a hindering or delaying of creditors; and if that had been the effect, I am not prepared to concede that we are therefore bound to hold that that was the intention, without regard to other circumstances.

It is not pretended that any debt except this Arnold debt was defeated or delayed; and the delay of the Arnold debt was not the necessary effect of what was done. If the creditor had taken steps to enforce it, which he might well have done seeing it was more than a dozen years overdue in 1872, it is impossible for us now to say that his remedy would have been delayed or defeated. The debt was only for three-fourths of the price of the lot, and the lot itself was held for it. We cannot even say that the original debt would have been increased by interest, beyond the date at which it fell due, as it would have been for a jury to say whether, under all the circumstances and in view of the conduct of the creditor as well as of the debtor, any or what rate of interest should be allowed as damages. (See *Montgomery v. Boucher*, 14 C. P. 45, and cases there collected by Richards, C. J.; and compare *Cook v. Fowler*,

L. R. 7 H. L. 27 : see also *Shepherd v. Walker*, L. R. 20 Eq. 659.) But even if the Acton lot had proved insufficient, and so there was after all a debt of some amount within the statute, there was other property retained.

In the case of *voluntary* conveyances by which creditors are hindered or delayed, it is laid down that we are bound to hold that the intent was to hinder and delay them. *Freeman v. Pope*, L. R. 5 Chy. 538, to which I have already referred, touches the subject. There the Lord Justice Giffard follows up the remarks which I have quoted from his judgment by saying: "For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them."

In *Smith v. Cherrill*, L. R. 4 Eq. 390, a settlement made on the occasion of her marriage by a lady who was in debt, in favour of collateral relatives, was set aside by Malins, V. C., who said: "Much has been said about the intention, but it is unnecessary to prove that there was an intention of delaying or defeating creditors, if it is seen that the effect has been to do so. You are bound to attribute such an intention to the persons who executed the deed."

This probably states the rule somewhat largely, and may be open to some of the animadversions of Sir W. M. James in *Freeman v. Pope*, upon Lord Westbury's judgment in *Spirett v. Willows*. *Ware v. Gardner*, L. R. 7 Eq. 217, already cited, is a case of the same class.

The subject seems to have been ably discussed in *Kent v. Riley*, L. R. 14 Eq. 190, before Lord Romilly, M. R. The settlement there in question was treated as voluntary,

and it was sustained, notwithstanding that some creditors were left unpaid, because it appeared that after the settlement the settlor had sufficient means left to pay his debts; but the Master of the Rolls refused him his costs because the suit had been caused by his improper conduct in not paying his debts with money which he had raised for the purpose. The settlor there had procured a loan of money upon a mortgage of his property, through the assistance of a friend, who had, when he agreed to give his services, insisted upon the settlement of the equity of redemption upon the wife and children of the settlor. This was treated in the case as a voluntary settlement, which it was so far as the wife and children were concerned. I think, however, there are other cases which shew that a settlement made under similar circumstances is not a voluntary settlement. *Thompson v. Webster*, 4 Drew. 228, 5 Jur. N. S. 668, is one of these, and is sufficiently important and instructive to invite an extended reference to its facts, as well as to the judgment of Kindersley, V. C., from which I have already cited one passage.

Joshua Coupe owed plaintiff £300, and he owed Horsley £92, and he owed some few other small debts. He had some real estate. Horsley obtained judgment against him for the £92 and costs. Coupe applied to his mother to advance him money, which she agreed to do if he would settle his property. She lent him £400 on mortgage of his property, and he conveyed the property, subject to the mortgage, to the defendant, upon trust to sell, and pay the dividends of the proceeds of the sale to the settlor for his life, and after his death to pay the whole to his children. Joshua Coupe took the benefit of the Insolvent Debtors' Act, and the plaintiff was appointed his assignee. Joshua Coupe died, and his mother died. The plaintiff filed the bill as assignee to have the settlement declared void under the Statute 13 Eliz., and asking an inquiry as to the amount actually advanced by Mrs. Coupe. Sir R. T. Kindersley, V.C., said that the principles applicable to these cases were now well settled, although in former

times there had been some difference and fluctuation of opinion. Some of the Judges had held that to bring the case within the statute it was sufficient that the deed was made without adequate consideration; others that the party making it must be indebted to the extent of insolvency; but it was clear that the mere fact of a settlement being voluntary, or without valuable consideration, was not sufficient ground *per se*. If two men, one worth £500, the other £100,000, each made a voluntary settlement, a different rule would be applicable in the different cases. Nor could it be necessary, for the purpose of bringing the case within the Act, that the settlor should be insolvent, for he might hinder or delay his creditors, although there was just enough to pay his debts. And the court or jury has to decide each particular case by its circumstances; but not being able to fathom a person's mind, we must judge by his acts connected with the surrounding circumstances. His honour then stated the manner in which Coupe was indebted at the time, and after referring to the making of the deeds, the effect of which was to withdraw from the reach of his creditors the only property he possessed and to convert it into a life interest, he said: "Now, taking these circumstances together, they do lead *prima facie* to a very strong impression that the intent of the transaction must have been to impede, defraud or delay creditors. But it is met with the observation that this settlement was not the spontaneous act of the settlor. \* \* It is true that in one sense there was no valuable consideration—that is to say, no money which can be considered as having passed for the benefit of Joshua Coupe, because Mrs. Coupe took an ample security; but what I have to look at is, what is the language of the Act of Parliament, and what is the construction put upon it by recent decisions. I am to look and see whether the instrument was made 'for the intent or purpose of delaying, hindering or defrauding creditors and others of their just and lawful actions, suits and debts.' Now, did Mrs. Coupe, or any of her solicitors know of the existence of any other debts than those which



were to be discharged? Did Mrs. Coupe know of this debt to the plaintiff? [His honour read the evidence as shewing that Mrs. Coupe knew of no other debt.] Then the onus lies upon the party alleging it to prove it. He may shift that onus by shewing a *prima facie* case, which I think the plaintiff does in this case, but the question is whether I can come to the conclusion that there was any such intention as that which is alleged. I understand that, with the exception of the plaintiff's debt, all the debts were satisfied by means of the advance then made to Coupe; yet, if the principle be as I consider it is, I must decide what the intention was, and I must decide affirmatively that the intention was to delay, hinder, or defraud. I cannot in this case come to that conclusion. I need not, therefore, go into the question of the right of the plaintiff to have the amount advanced on mortgage investigated."

Another case is the more recent one of *Bayspoole v. Collins*, L. R. 6 Chy. 228. In that case the subject of the contest was a post-nuptial settlement, made by one Culy, of an equity of redemption worth £1,300, in trust for the wife and children of the settlor. The bill was filed by a subsequent mortgagee to have the settlement declared void as against him under 27 Eliz. ch. 4. It was held not to be voluntary, because made at the instance of a friend of the wife, who, as an inducement to make it, had lent the settlor £150 upon his promissory note, payable on demand. This was held by James, V. C., and afterwards by Lord Hatherley, L. C., to be a consideration sufficient to take it out of 27 Eliz. ch. 4, notwithstanding that it was not mentioned in the deed. It is stated in the report that Culy having become bankrupt, an attempt was made by him and his assignees, but without success, to have the settlement set aside by the Court of Bankruptcy, under 13 Eliz. ch. 5.

This last fact justifies my reference to the case, because it may not be quite certain that a consideration which would be sufficient to make it unnecessary, for the purposes



of 27 Eliz. ch. 4, to hold a deed to be voluntary, can always be safely relied on for that purpose when the other statute, 13 Eliz. ch. 5, is in question. The most recent case touching the distinction in the application of the two statutes, is *Ridler v. Ridler*, 22 Ch. D. 74.

The settlement before us is not voluntary. According to the evidence it was not the spontaneous act of the settlor, but was brought about by pressure on the part of the sons, who had attained the ages of about twenty-nine and thirty-one, and who desired some definite arrangement as to their future. Whether they had any claim upon their father, amounting to anything like a legal debt, for services since coming of age, does not seem to me a matter of any consequence on the question of the settlement being voluntary or for valuable consideration. It would go to the *quantum* of the consideration only. But it was not the only consideration.

That it was for valuable consideration as regards the sons is clear. Therefore, under the authorities I have referred to, the mere fact of creditors being delayed or hindered by it, if such were the fact, would not dispense with further proof of the intent.

In my opinion the plaintiff has failed to shew that the intent existed. I think he has failed as to the father as well as with regard to the sons. But even if, by any treatment of the evidence, it ought to be held that the fraudulent purpose actuated the mind of the father, the transaction would be saved by the *bona fides* of the sons, of which I cannot say I entertain any doubt.

I may be pardoned for citing, though any authority on the subject except the sixth section of the statute is unnecessary, the case of *Kevan v. Crawford*, L. R. 6 Ch. D. 29, in which an antenuptial settlement was held good by reason of the innocence of the wife, although made in fraud of the husband's creditors and carried out by a deed which falsely recited that the sum of £20,000, which was the subject of the settlement, was a debt due by the husband to the wife.

I may also refer to the very recent case of *In re Johnson—Golden v. Gillam*, 20 Ch. D. 389. The deed there in question was a deed of gift by which a mother conveyed farming property in trust for her daughters, in consideration of which they covenanted to pay the debts incurred by their mother in connection with the working and management of the farm, and to maintain their mother. It was a conveyance of all the grantor's property. The deed was impeached by a creditor who held a promissory note of the grantor for a debt which was not incurred by her, and was not one of those covered by the covenant of the daughters. The deed was held by Mr. Justice Fry to be valid, upon considerations similar to those which I have applied to the case before us; and his decision was affirmed by the Court of Appeal, W. N. (1882) p. 22.

The transaction of 1878 is admitted to have been entered into with the object of saving the living of the old couple from this particular debt. I do not know that it was contended that the fraudulent design at this later date reflected back to the year 1872, so as to aid the plaintiff in his attack upon the original settlement, or that a sale made of the Acton lot to a Mr. Campbell, while the judgment was impending, had any such retrospective influence. It has struck me all along that these later ill-advised attempts to avoid payment of the expected judgment tend to confirm the idea that no one thought of this debt in 1872.

The defendants, in their answers, submit to have the settlement of 1878 set aside, and that of 1872 restored. If this would be of any service to the plaintiff, we ought to do it, and to give him his costs up to the filing of the answers, letting him pay defendant's costs only of the proceedings subsequent to answer; and it may be that we ought not to stop short at setting aside the deeds, because if they were allowed to stand further proceedings might be necessary to realize whatever interest was exigible in equity under the settlement of 1872, while an order by way of equitable execution would be within the scope of the present action: *Holmes v. Penney*, 3 K. & J. 98.

But if no such interest happened to exist, then, whatever may have been the purpose of the settlement of 1878, it will not interfere with the plaintiff, and we should not disturb it.

In order to deal with this point, it is necessary to look, more particularly than we have yet done, at the terms of the mortgages of 1872, so far as they relate to the interest secured to Dugald McTavish. The mortgagees, it will be remembered, are both Dugald and his wife. Hugh's mortgage is to be void on payment of Peter's \$550, as already mentioned, "and on the said mortgagor providing the said mortgagees and the survivor of them with the following yearly allowances, to be supplied the said mortgagee and the survivors of them yearly and every year during the term of their natural life, or the life of the last survivor of them, that is to say, to provide pasture, feed, shelter, and attendance, winter and summer, for two milch cows, for the said mortgagees, or the survivor of them along with the milch cows of the said mortgagor, and on the land herein described ; to supply them and the survivor of them yearly and every year during said term, as they may require the same, with 150 pounds of good pork, 50 pounds of good beef, 400 pounds of good merchantable flour, two bushels of good clean pease, as many roots as they may require for their own use, and the sum of \$50, payable in half-yearly payments of \$25 each, \* \* to provide them a suitable cooking-stove for their own use," with further similar stipulations respecting use of milk-house and cellar, replacing cow when necessary, providing fire wood, keeping fowls, and permitting Peter to have a home with them while single.

The terms of Donald's mortgage are essentially similar, substituting a horse and four ewes and their lambs for the two milch cows, omitting the reference to a home for Peter, and providing that Donald should pay half the expenses of fencing the Acton lot, and team thereto half the materials required for putting up a dwelling-house thereon, whenever required so to do.

The principles on which this part of the case has to be dealt with have been discussed in this Court in *Fisken v. Brooke*, 4 A. R. 98, so fully and so recently as to make it unnecessary to consider them afresh. I think that case governs the present one, and is conclusive against any claim for equitable execution founded on the settlement of 1872. There is no interest in the husband separate or capable of being separated from that of the wife, or of the nature of an interest in the land attachable by a creditor. The only item which can be pointed out, amongst all the details of the provision for the support of the old couple, which seems open to question, is the annuity in money. I am strongly of opinion that there is no essential difference between that and the other provisions. It is secured to the two jointly, and is obviously, like the rest, intended for their joint use, and not divisible in halves or any other ascertainable proportion between them.

There was not much, if there was any, reference to this point in the argument before us. Had the right to payment out of this money annuity, as apart from the general provision for maintenance, been insisted on, there would have arisen the further question whether, inasmuch as the covenant to pay it creates a legal debt, the remedy must not be sought otherwise than in this action: *Horsley v. Cox*, L. R. 4 Chy. 92.

I do not know that the plaintiff looks to this money in particular; but, as he may possibly do so, I should be willing to concur in a decree that would leave him at liberty to resort to any interest of his debtor which he may consider available under the settlement of 1872.

Therefore, although not satisfied that he has shewn himself entitled to have the deeds of 1878 set aside: yet, as the defendants do not object, I think the plaintiff may, if he desires it, retain his judgment so far as it avoids those deeds.

In other respects, and as to those deeds also unless the plaintiff signifies his desire to the contrary, I think we should allow the appeal and dismiss the action; and I think

the defendants should in either case have their full costs of the action, including the costs of the appeal; because, even if the later deeds are set aside, it will be for reasons not presented by the complaint, and, as far as I am concerned, upon the consent of the defendants.

So far I have not discussed the status of the plaintiff as assignee of the mortgage debt.

If I had to try an issue such as might have been raised in the common law action by a traverse of the assignment, I should require very different evidence from any at present before us to lead me to the conclusion that any assignment, either in form or in legal effect, ever existed.

I have already sufficiently explained that I am not convinced by the evidence that the debt now set up was ever regarded as an existing debt. If I have to exercise my judgment upon the effect of the evidence, I should feel bound to say that I believe the assertion of the debt in 1876 much more likely to have arisen from forgetfulness than from recollection of facts. I mean forgetfulness of the reasons, which I cannot doubt must have once been understood, for forbearing to urge the claim in the long interval from 1857; because I cannot reconcile such forbearance with the belief that the debt existed. The unregistered deed from Arnold to McTavish, and the uncompleted mortgage from McTavish to Arnold, and the unanswered letter from McTavish to Knight, whatever was the story they told to those who knew of the transaction, cannot, to my apprehension, have been understood to represent that Arnold had conveyed the lot to McTavish and that McTavish had mortgaged it to Arnold for part of the purchase money. Entertaining this view as to the debt itself, I should not have been prepared to find evidence of an assignment of it. The absence of such evidence is only consistent with what, in my judgment, is the proper understanding of the evidence we have.

At the same time I am not of opinion that the question of assignment or no assignment is material to the disposition of the present case.

The plaintiff has recovered judgment against Dugald for a debt which, apart from or in aid of the allegations of the judgment roll, has been identified as that evidenced by the covenant in the mortgage as being for the purchase money of the Acton lot.

As far as Dugald McTavish is concerned, the plaintiff is rightfully entitled to execution for that debt, and the property which belonged to Dugald is liable to seizure under that execution, if the conveyance under which it is claimed by his sons was made with the forbidden intent.

Grant the fraudulent intent to defeat that debt by the conveyance; and grant a regular judgment and execution for the same debt; and in my opinion you cover the whole ground, leaving no room for any contest by the grantees of the land concerning the title of the execution plaintiff.

MORRISON, J. A., concurred.\*

*Appeal allowed, with costs.*

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\*ARMOUR, J., was absent when judgment was delivered.

## DUMBLE V. DUMBLE.

*Will—Testamentary paper—Death without issue—Construction.*

Testator by his will gave all his property real and personal, to trustees, directing that his wife should receive all rents and interest during widowhood, and until his youngest child should come of age: that in case of her death or marriage before the youngest child came of age, his property should be divided equally among his children on their respectively coming of age, and in case all his children should die under age without issue, their portions should be divided equally among his brothers and sisters.

A letter was found among his papers, addressed to his wife, saying that he had made two wills, "one before I was married, which is to be considered void, but the other I wish to modify, as it was written in a hurry. I wish my dear wife and our children to have all my property, to be divided equally, my wife to have the use of the whole until the children are of age. In case of death of my children my wife to have the use of the property her lifetime, and then to go to my brothers and sisters."

The testator left two children, who both died under age unmarried, their mother surviving them.

*Held*, reversing the judgment of the Court below, 29 Gr. 274, that the will and letter must be read together, and the will must stand except so far as "modified;" that the "death of my children" referred to their death under age without issue before his wife; and therefore that she took the personalty (which alone could be affected by the letter) for life, and after her death it would go to testator's brothers and sisters.

THIS was an appeal by the plaintiffs from a decree of the Court of Chancery pronounced by Proudfoot, J., (29 Gr. 274) where the facts sufficiently appear, and came on to be argued before this Court on the 14th Sept., 1882.\*

*C. Robinson*, Q. C., *Bethune*, Q. C., and *G. H. Watson* for the appellants, referred to *Da Costa v. Kier*, 3 Russ. 360; *Edwards v. Edwards*, 15 Beav. 357, 366; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, L. R. 7 H. L. 408; *Grey v. Pearson*, 6 H. L. C. 61; *Horn v. Pillans*, 2 M. & K. 15, pages 22, 23; *Galland v. Leonard*, 1 Swans. 161; *Cripps v. Wolcott*, 4 Madd. 11; *Daniel v. Warren*, 2 Y. & Col. C. C. 290; *Towns v. Wentworth*, 11 Moo. P. C. 526; *Roper on Legacies*, 4th ed., page 610; *Hawkins on Wills*, 2nd ed., page 231; *Theobald on Wills*, 2nd ed.,

\* *Present*.—SPRAGGE, C. J. O., HAGARTY, C. J., BURTON and PATTERSON, JJ. A.

page 337 ; *Jarman* on Wills, 4th ed. page 707 ; as establishing that the gift to the children of the testator provided for in the will and letter set out in the pleadings did not become absolute upon the death of the testator : but on the contrary it was contingent, and subject to be divested in the event of the death of the children before they came of age ; and all the children of the testator having died before they came of age, the brothers and sisters of the testator became entitled to the personal estate of the testator subject to the express bequest to the respondent therein.

*MacLennan*, Q. C., for the respondent.

It must be conceded that the wife's share vested immediately upon the testator's death, as there is nothing whatever to postpone it. It follows, therefore, that the children's shares vested at the same time, for it is one single gift. The contention of the appellants involves the anomaly that one part of an entire gift should vest at one time and another at a different time. The arguments urged on behalf of the appellants are that in case of there being several children there is no vesting until the period of division, which it is said is when the youngest child becomes twenty-one. Any who died before the period of vesting would take nothing ; therefore, if all but one lived to be twenty-one, and died while one was still a minor, those who so died would take nothing, nor their children either, though they might have left children. This, it is submitted, was an intention which never could have been in the mind of the testator.

The natural meaning of the words, "my wife to have the use of the whole until the children are of age," is, that each should receive his share as he became of age, and there is therefore no time fixed for a general division or distribution to which the death of the children can be referred.

*Hawkins* on Wills, 255 ; 2 *Jarm.* 752, 4th ed ; *Theobald* 2nd ed. 483, and 2 *Williams' Ex.*, 8th ed., 1266.



March 6th, 1893—SPRAGGE, C. J. O.—The bill in this case is filed for the interpretation of the will of Thomas Dumble.

The will is dated 13th May, 1865, and makes this disposition of his property. He gives all his property, real and personal, to his brothers, the plaintiffs, "to hold upon the following trusts:"

He appoints that his wife shall receive all rents and interest accruing from real and personal property during her widowhood, and until his youngest legitimate child should become of age.

Upon the youngest child coming of age he appointed that his wife should receive one-third and his children two-thirds of the realty and personalty.

He provides for payment to his wife of £500 as her share, in the event of her marrying again.

In case of the death of his wife, or her marrying again before the coming of age of the youngest child, he directs that his property should be divided equally among his children upon their respectively coming of age. He directs that in case all his children should die under age without issue, their portions should be divided equally among his brothers and sisters. The will was duly executed to pass real estate.

A paper in the handwriting of the testator was found among his papers after his death, which is as follows :

" COBOURG, Dec. 17th, 1868.

" *To Mrs. Thomas Dumble, jr. :*

" MY DEAR WIFE,—I write this that in case of an accident or injury happening to myself you might know that I have made two wills, one before I was married, which is to be considered void, but the other will I wish to modify, as it was written in a hurry. I wish my dear wife and our children to have all my property to be divided equally, my wife to have the use of the whole until the children are of age. In case of death of my children my wife to have the use of the property her lifetime, and then to go to my brothers and sisters.

" THOMAS DUMBLE, JR."

This paper is not attested ; and is, therefore, inoperative to affect the realty ; but is still a valid testamentary paper so far as the personalty is concerned.

The testator died in May, 1869, leaving two infant children and his wife surviving him; and the contingency provided for in the last clause of his will happened; both children died under age unmarried, their mother surviving them.

It is to be observed that the testamentary paper of December, 1868, is not in substitution of his will; but its purpose is expressed to be to "modify" it. This is the more clear from the different terms in which, in the letter, he refers to the two wills that he had previously made; the one made before marriage "is to be considered void, but the other," he says, "I wish to modify." It follows that the will stands except in so far as it is modified; and we must read the will and the paper by which it is modified together to get at the full and final intention of the testator. So reading the two documents there is some considerable change made by the later paper from the dispositions made by the will, and much is left unchanged.

The contention of the widow is, that the share of the children, as well as her own share, vested upon the death of the testator; and, reading the last clause of the testamentary paper in relation to the death of children in substitution for the clause in the will providing for the same event, which she contends is the proper reading of it, her contention is that the period of death there provided for, is the death of the children during the lifetime of the testator; and her counsel point to the consequence of holding otherwise, viz.: that the issue of children dying under age are left unprovided for; and that the share of such children would go over to brothers and sisters of the testator, instead of to the issue of such children.

It would be unfortunate if we should feel ourselves bound to hold that such would be the consequence; but if the two testamentary papers are read together no such consequence would ensue, inasmuch as the words "in case of death of my children," in the later paper, would be held to refer to the same contingency as in the will itself, where it is more fully expressed, and where the con-

tingency is in terms, the death of all the children under age without issue ; and here the later paper comes in most usefully in the interest of the wife, for while the will itself made a gift over to brothers and sisters of the shares of children in the event of their all dying under age without issue, the later paper gave "the use of the property" to the wife for life, intending, of course, both realty and personalty, but under the later paper operative only as to personalty.

Taking the two together, the disposition of the property upon the death of children will read thus : "In case all my (legitimate) children die before they come of age without issue, then my wife is to have the use of the property during her lifetime ; and then it is to go to my brothers and sisters." The disposition of the property thus made is so clear and distinct, and the intention of the testator so manifest, that it is difficult to attach to it any but the one meaning, that if all the testator's children should die at any time before the death of his wife, she should have the user of the property for her life, and that upon her death it should go over to the brothers and sisters.

The construction given to the will in the Court below proceeded upon the idea that the later paper was a substitution for the will ; that it so superseded the will that the will itself afforded no clue to its meaning. But for proceeding upon that idea the learned Judge would probably have given effect to the gift over ; for in the passage immediately following that which he has quoted from Mr. Justice *Williams's* book on Executors, 8th ed., p. 1266 is this : "But in the case of an immediate bequest to any person, and in case of his death without children to another, it has been held that if at any time, whether before or after the death of the testator, the legatee dies without leaving a child, the gift over takes effect ; for the event over is not a certain, but a contingent event ; and the introduction of a previous life estate will not alter that principle of construction, unless a contrary intention appears in the will."

Mr. *Jarman*, 4th ed. vol. 2 p. 756, after stating that the rule invoked in the Court below is only made *ex necessitate rei* from the absence of any other period to which the

words can be referred, adds, "Consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease) the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession." In *Theobald* and *Hawkins* the rule is stated in substantially the same terms.

This rule of construction is established by *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Olivant v. Wright*, 1 Chy. D. 346; and *Besant v. Cox*, 6 Chy. D. 604, may also be referred to. It is a rule of plain common sense; and it is obvious that any other construction of the will of this testator as manifested in the two testamentary papers would override the intention of the testator, that in the event which he contemplated might happen, and which in fact did happen, his wife should, for her life only, have the usufruct of his property, and that after her death it should pass to his brothers and sisters.

I cannot but think that the judgment in the Court below is attributable only to the discarding the formal will in the construction of the later testamentary paper.

The decree should be varied by striking out so much of the declaratory part thereof as declares that upon the death of the children of the testator the defendant became entitled to the shares of the children absolutely for her own use, and substituting for the words "absolutely for her own use," the words "for and during her natural life," and adding, "and that upon the death of the said defendant the brothers and sisters of the said testator are, under the provisions of the said will and letter, entitled to the said personal property absolutely to their own use in equal portions."

The costs of the appeal should be given in the way directed by the decree in respect of the costs of suit.

HAGARTY, C.J., BURTON and PATTERSON, JJ.A., concurred.

## ROSENBERGER V. GRAND TRUNK RAILWAY COMPANY.

*Railway crossings—Signals.*

The respondents, the plaintiffs in the Court below, were lawfully driving in their carriage along the highway, and when within about 116 feet of the crossing of appellants' railway a train passed, which frightened the horse causing it to turn and upset the vehicle, by which the plaintiffs sustained serious injury. It was shewn that the driver of the locomotive had omitted to give the usual statutory signal, by whistling or ringing a bell, when at a distance of eighty rods from such crossing. In an action brought against the railway company a verdict was found in favor of the plaintiffs, which the Common Pleas Division [WILSON, C. J., dissenting] refused to set aside. On appeal this judgment was affirmed, and the appeal dismissed with costs [BURTON, J. A., dissenting].

*Per* BURTON, J. A., the general words used in the statute must, having regard to the general provisions thereof, be intended only for those actually crossing the railway and injured when so crossing, or who in the exercise of reasonable diligence and care, but in endeavoring to escape peril, have sustained injury. The sounding of the whistle or the ringing of the bell was intended as a warning only to those about to cross the track of railway.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division (reported 32 C. P. 349), where, and in the judgments, the facts of the case are fully and clearly set forth.

The appeal came on to be argued before this Court on the 22nd and 23rd days of January, 1883.\*

*Bethune*, Q. C., for the appellants. Although two trials have already taken place in this cause, there is not any finding by the jury saying that the injury sustained by the respondents occurred in consequence or by reason of the alleged non-observance of the statutory duty cast upon the appellants, of sounding the whistle or ringing the bell when approaching the crossing near which the accident happened; and the Court below should not have supplied such finding upon the evidence which has been given.

It was contended at the trial, and the appellants still insist, that such alleged omission to observe this statutory

\**Present.*—SPRAGGE, C. J. O., HAGARTY, C. J., BURTON, J. A., and PROUDFOOT, J.

duty was not the proximate cause of the injury; and it is shewn that the respondents were guilty of contributory negligence, and therefore were not entitled to recover.

The object of the statute in requiring a signal to be given by either whistle or bell was to prevent injuries by collision; but here there was no collision; the horse was frightened by the appearance of the train, and therefore the company were not answerable in damages; in other words, the appellants did not owe the respondents any duty to give the signals mentioned in the statute.

*Bowlby* for the respondents. The finding of the jury, in answer to the sixth question\* submitted to them by Mr. Justice Patterson, who tried the case, taken in connection with the evidence, which must always be done with the findings of juries given in answer to questions, sufficiently shews that the respondents sustained the injury complained of by reason of the neglect of the appellants to give the requisite statutory signal by whistle or bell. This case has already been twice tried by a jury; and another new trial will not be granted for the mere purpose of asking the jury one additional question, the answer to which the Court can foresee to a certainty upon the evidence now before it, and upon which the Court itself has full power to find and give judgment by the O. J. Act, Rule 321, and upon which the evidence is conclusive in favour of the respondents.

The respondents did not admit at the trial that the non-observance of the statutory duty as to signal was not the proximate cause of the injury to the respondents. On the contrary, the respondents then contended, and still contend, that (in the words of the statute) their "damages were sustained *by reason* of such neglect;" and that the negligence of the defendants was such a proximate cause of the injury that they are liable therefor, although the two circumstances—the rush of the train

\* The question was, "If the plaintiffs had known the train was coming, would they have stopped the horse further from the railway?" The answer of the jury was, "Yes."

and the fright of the horse — intervened between the neglect and the injury.

So far as contributory negligence is charged against the plaintiffs, all that need be said is that there was no evidence of any such, and the jury found there was none. Here the evidence clearly establishes that the train was unlawfully upon the highway, without having first given the signals required by the statute, while passing over the last eighty rods of their approach to the crossing of the highway, and for this neglect the company is subject to a penalty of \$8 by the statute, even if there had been no accident. This statutory penalty of \$8 imposed on the appellants made their act in bringing their train upon the highway at the time in question unlawful and unauthorized, and so brings this case within that large class of cases where it is held that if an act be done upon the highway which is not a part of the lawful user of it, and which endangers its use to others, and damage results from such use, an action will lie.

*Toms v. Corporation of Whitby*, 35 U. C. R. 195; *Shields v. Grand Trunk R. Co.*, 7 C. P. 111. *Tyson v. Grand Trunk R. Co.*, 20 U. C. R. 256; *Miller v. Grand Trunk R. Co.*, 25 C. P. 389; *Wakefield v. Connecticut R. W. Co.*, 37 Verm. 389; *Hamilton v. Johnson*, 5 Q. B. D. 263; *Norton v. Eastern R. W. Co.*, 113 Mass. 366; *Pollock v. Eastern R. W. Co.*, 124 Mass. 158; *Prescott v. Eastern R. W. Co.*, 113 Mass. 370; *Harris v. Mobbs*, 3 Ex. D. 268; *Vars v. Grand Trunk R. W. Co.*, 23 C. P. 143, were referred to.

July 29th, 1883, SPRAGGE, C. J. O.—In this case there have been two trials, the verdict in each being in favour of the plaintiffs.

One ground for appeal now is, that the finding of the jury in reference to the giving of the signals is against the weight of evidence.

I have read the whole of the evidence. In the case of *The Dublin & Wicklow R. W. Co. v. Slattery*, L. R. 3 App.

1155, the law Lords, I think, without exception, expressed their strong disapprobation of the verdict, intimating their opinion that the jury were not unwilling to gratify their feelings of compassion for the plaintiffs at the expense of the defendants. Lord Blackburn said, p. 1208: "The weight of the evidence was for the jury, not for the Judge. The defendants' evidence was extremely strong that there was a whistle. The jury chose to disbelieve the defendants' witnesses; or, I think more probably, though believing them, chose to find for the widow and orphans against the railway company. I think such a verdict was most unsatisfactory."

The verdict in the case before us is certainly not open to any such observations as were made in the case in the Lords. There was in this case really such a conflict of evidence that we cannot say that the verdict is attributable to the sympathy of the jury for the plaintiffs. In my opinion this ground of appeal is untenable. The dissentient Judge in the Court below, the learned Chief Justice of the Common Pleas, does not indeed base his judgment at all upon that ground; for he says, "There is certainly the neglect of the company to the satisfaction of the jury," adding, not without reason, I fear, in reference to a certain class of cases, "whatever that may be worth in such an action."

The next passage in the Chief Justice's judgment is: "And no neglect or cause of complaint has been proved against the plaintiffs, who have been seriously injured by the accident;" and in this, after a careful perusal of the evidence, I entirely agree. It meets another ground of appeal, "that the plaintiffs were guilty of contributory negligence."

Upon the main question, however, in which the learned Chief Justice differed from his brother Judges in the Court below, I am unable to agree with him. His opinion is shortly, that the statute, upon which he assumes (probably correctly) that this action is brought, applies only to cases of injury from actual collision, not to accidents resulting



from other causes, though produced by the negligence of the servants of the railway company in the railway service. He says, "The statute was passed for a wholly different purpose, and their (the plaintiffs') claim cannot be distinguished from the many other analogous cases in which there is as much necessity for protection, and in my opinion more necessity in some of them, yet it has never been thought necessary or prudent to extend the law to meet such cases."

I confess I feel difficulty in appreciating the force of the learned Chief Justice's reasoning. He puts a number of cases to which he assumes that the statute does not apply, and draws the conclusion that if it does not apply to them, it cannot apply to the plaintiffs' case, because their case is not a case of actual collision. But the statute contains not a word about actual collision. Its language is wide enough to comprehend, if not all the cases put by the Chief Justice, (and it is unnecessary to say what of them it does comprehend,) it is certainly wide enough to comprehend the plaintiffs' case. They were driving along the highway, from one place to another place, to reach which it was necessary to cross the railway track where it intersects the highway, and they were approaching the point of intersection when the accident occurred. It must be taken upon this branch of the case, to have been occasioned by the negligent omission of the company's servants to give the warning required by the statute. Now what does the statute provide in the way of penalty and compensation in that event? Besides a pecuniary penalty, it provides that the company shall also be liable for all damages sustained by any person by reason of such neglect. I really cannot see any warrant for saying that these words shall have only half their ordinary meaning; that all damages sustained by any person shall be read as meaning, "such damages as may be sustained by such persons as may suffer injury by reason of actual collision."

There is nothing in the context to shew that the language used is to be read in any other than in its ordin-

any grammatical sense; and that being so, we violate a plain rule of interpretation if we read it otherwise. But it is said that certain consequences would follow if we so read it. What are those consequences, even assuming that they would follow? Only that the statute omits to provide compensation for other cases of injury occasioned by the like neglect? Take it to be so, it can be no reason for holding it not to provide compensation for a class of cases within its provisions. Then there are no words of exclusion of any class. The law may say as to some cases that the injury is too remote, or the damage too remote; but the statute does not say so. In few words, the statute neither names any class nor excludes any class. But again, supposing some class impliedly excluded, some class to which the remedy given by the Act could not apply, a class too in which there is, as put by the learned Chief Justice, as much necessity for protection as in the class to which these plaintiffs belong—how would it be a reason for denying to the plaintiffs the remedy given by the statute? We might call it a *casus omissus*, or might surmise that for some reason, sufficient or insufficient, it was designedly omitted. The question still seems how is it a reason for denying to the plaintiffs their remedy. No doubt the statute *must* apply to a case of actual collision or it could not apply to any case, but its undoubted application to such a case can be no reason for denying its application to other cases coming fairly within its provisions.

I do not feel pressed by the question that has been propounded. To whom does the railway company owe the duty of giving warning by whistle or bell? The question does not aid the argument one way or the other. The answer is obvious: it owes the duty to all who may receive detriment by its omission, whomsoever they may be.

The case has been treated as if this duty of giving warning were merely the creature of the statute; if this were so the plaintiffs are entitled to recover, because their case is within the statute. But if there were no statute, a duty would (I express here only my own individual opinion)

still lie upon the railway company to give warning of the approach of trains. Railway trains are described in the books as being, what indeed almost every one knows them to be, elements of danger, not readily stopped or turned aside, as some of the Judges have said ; and it is incumbent on those who use them to use care and skill in their use commensurate with the danger to which their use exposes the lives and limbs and the property of those who may be affected by their use. This is only an application of the well-known maxim: "*Sic utere tuo ut alienum non lædas.*" It follows from this, again giving my own individual opinion, that the duty of giving warning was a common law duty, and that those who suffered injury by the neglect of that duty had a common law right of action against the wrong-doers. The statute only defined how that duty should be performed, and annexed a penalty besides compensation for its non-performance in the way prescribed. It in no way abridged the duty ; its purport was to define it. There is not a word in it that points to the abridging of the common law right of those suffering injury through a neglect of duty, or taking away the right of any one who, at common law, was entitled to a remedy. Whether his action would be trespass, or action on the case for consequential damage, is now quite immaterial. I think it very clear that there being no negligence, as the jury have found, a right of action accrued to these plaintiffs, if that accident caused the injury for which the plaintiffs have recovered damages.

In my view, adjudged cases can scarcely be necessary to establish that the right to damages is not confined to actual collision. But adjudged cases are not wanting. There is the case of *Fullarton v. Manchester and South Junction R.W. Co.*, 14 C. B. N. S. 54, which was referred to by the Chief Justice of the Queen's Bench Division during the argument of this appeal. The damage in that case was to a carriage and carriage horses, and was not the consequence of a collision, but of horses taking fright and becoming unmanageable from the

noise and the rushing of the steam caused by the blowing off of steam through the "mud cocks." It was held to be negligence, entitling the plaintiff to recover damages. There is also the case of *Longmore v. Great Western R. W. Co.* 19 C. B. N. S. 183, and the language of the Judges in *Crafter v. The Metropolitan R. W. Co.* 12 Jur. N. S. 272, in reference to that case and the case then before the Court. These were not cases of collision, and there are several American cases, to which I do not think it necessary particularly to refer.

In no case that I have seen has the test been whether there has or has not been collision ; but whether there has been negligence, and injury to person or property as the consequence of that negligence.

There remains to be considered the argument of Mr. Bethune—that if the statute had been complied with, if the bell had been rung or the whistle sounded at the distance of 80 rods from the crossing at the highway, the plaintiffs would still have met with the accident ; his argument from this being, as I understand, that the omission to do what the statute requires was not the cause of the injury.

This is a defence that should be made out very clearly. I do not think that the evidence supports it. It seems to be founded upon the evidence of the younger sister. She says that before the accident she would have considered it safe to drive as near as a quarter of a mile from the railway crossing, and would not have liked to drive any horse nearer. I suppose the argument is that if the signal had been given eighty rods from the crossing the plaintiffs could not have reached a place of safety, *i. e.*, a quarter of a mile from where they were, before the train would have reached the spot where its appearance caused the horse to become unmanageable. Take this to be so, it by no means follows that the accident would still have occurred. As things stood, the train appeared at a distance of about 160 feet from the horse ; the horse facing it, and seeing it, and struggling to turn round and get away. As things would

have been if the warning had been given eighty rods away, the state of things would probably have been materially different. The plaintiffs approached towards the track very cautiously, looking out up and down the track, and listening very intently. They would not, intentionally, be so near the track as they then were. If the whistle had sounded eighty rods away, the course of the elder sister, the driver, would almost certainly have been to turn the horse from the track and drive away from it, and that probably at a much smarter pace than that at which they had been approaching it. At the rate at which the train was going, it would take about two minutes to reach the spot at which its appearance frightened the plaintiffs' horse; at that time there had been time for the horse to be nearly 1000 feet from the spot where he had faced the engine, and with his back to it; or if he could have reached even half that distance the accident would probably not have occurred.

The conditions are so essentially different between what they were in fact and what they might have been if the proper warning had been given, that it is impossible to say that the accident would have occurred if the warning had been given. That ground of defence appears to me to fail entirely. I agree with Mr. Justice Osler that the whole question of the liability of the defendants is open on the pleadings and evidence under Rule 321 of the Ontario Judicature Act.

Upon the whole, my conclusion is that the appeal should be dismissed, with costs.

HAGARTY, C. J.—I concur in the result arrived at by his Lordship the Chief Justice, but I rest my view not on any common law liability, but on the express provision of the statute, which was intended no doubt for the benefit of the whole travelling community; therefore I think the judgment should be affirmed, and the appeal dismissed, with costs.

BURTON, J. A.—The plaintiffs have recovered a second time, by the verdict of a jury, damages against the defendants for the alleged neglect of a statutory duty to sound the whistle or ring the bell when approaching a crossing, by reason whereof it is alleged that the accident occurred; and it is now contended, and I think with much force, that the defendants did not owe to the plaintiffs, in the circumstances which happened, any duty to give those signals; and it is, I think, much to be regretted that this question had not been raised by demurrer, and thus, if the objection is entitled to prevail, have avoided the serious expenses which have been incurred in the two trials.

The question is, whether, admitting that a breach of duty has been shewn, and admitting, for the purpose, of the decision, that there has been a consequent injury, was the Legislature intending to legislate to protect against such an injury, or for an altogether different purpose that purpose being to give timely notice to persons attempting to cross the railway where it intersects the public highway.

The Legislature, when authorizing the construction of railways, knew that they would be through their whole length frequently adjacent to, and in some places would cross the public highways of the country, and consequently that passengers upon the highways would be to a considerable, and frequently to a dangerous extent, incommoded by the passage of locomotive engines and trains along the railroad, and that the portion of the public having occasion to use the public highway would sustain some inconvenience for the sake of the greater good to be obtained by the much larger portion desirous of availing themselves of this more expeditious method of travelling or transporting merchandize, by rail.

The Legislature might have annexed any condition to the use of the road by the defendants, as by requiring them to keep a bell or whistle to be constantly rung or sounded.

They have, in fact, annexed a number of conditions, such, for instance, as that the railway shall not be carried *along*

a highway without leave from the proper municipal authorities ; that where it crosses a highway it shall not rise above or sink below the level of the highway more than one inch, and that at every crossing at a level sign-boards shall be erected, having the words "railway crossing" painted on them ; the erection of fences on each side of the railway, and many other matters ; but nowhere except in sec. 104 are they required to blow a whistle or ring a bell. If this section, therefore, had been altogether omitted, the sounding the whistle at the crossing so as to frighten horses waiting to cross the line, would be sufficient to warrant the conclusion that the company was guilty of actionable negligence. See *Manchester Railway v. Fullarton*, 14 C. B. N. S. 54, referred to by the learned Chief Justice, and *Hill v. Portland R.W.* 55 Maine 438, where it was held that a company might be held liable for using a steam whistle as a signal for the starting of a train from the station near to a crossing.

In this country the section in question requires that the bell shall be rung or the whistle sounded as the train approaches the crossing, the object being to warn all persons of such approach in season, to enable them to stop at a safe distance, and thus avoid the risk of a collision. No company therefore could be held liable for damages for giving such signal as is required by law when given within the limits named in the statute, but the statute does not authorize or require the sounding of the whistle at any other time or place, and the right or liability at such other time or place depends upon the general principles of law applicable to negligence upon the peculiar facts of each case. The pleadings shew and the evidence establishes that the plaintiffs were not, at the time the injury happened, at or near the crossing, but at the distance of about 116 feet from the track, when they were warned by some one that the train was coming, and stopped their horse, which took fright at the engine and ran away, upsetting the buggy to which it was attached, and causing the injury. Whether this was actionable must depend upon the con-



struction of the statute. If the thing here directed to be done, viz., the sounding of the whistle or the ringing of the bell, was enacted for the benefit of persons in the position of the plaintiffs, then the action lies; if, on the other hand, it was enacted only for the benefit of those persons who had occasion to cross the track, and who were liable to injury from actual collision, then it is not maintainable.

When I say actual collision I do not mean to exclude the case of persons who, having been led by the omission of the defendants to give the statutory warning to approach so near the track as to be in danger of actual collision, have in the exercise of reasonable diligence and care in endeavoring to escape peril sustained injury.

It is of course now well established that where a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.

Such was the case in *Gorris v. Scott*, L. R. 9 Ex. 125. It is true that, in that case, the statute contained a recital shewing the purpose for which the Act was passed, but looking at the provisions of this enactment the purpose and object of them are reasonably clear.

I have pointed out that the Act does not require the bell to be rung or the whistle sounded at or near the approach of any place where the highway runs parallel to or in close proximity to the railway, or where it crosses the railway by a bridge, but only at such places where the railway crosses the highway on a level, or where only there would be danger of a collision of the train with persons or their horses or carriages.

The bell is required to be rung or whistle sounded at the distance of eighty rods from the crossing, and to be kept ringing or whistling until the train has passed such crossing; the time occupied in going that short distance is barely more than sufficient to warn persons about to cross; it is manifest it was only intended to warn such persons, and not persons at a greater distance.



At a crossing it is necessary to give notice to travellers approaching the place of crossing, and before crossing that they should not venture to do so while the train is approaching; and the warning is given with that object.

Why should a different rule be adopted in the case of persons on the highway approaching the crossing but not intending to cross it, than is applicable to persons travelling upon other highways in immediate proximity to the railway? That these plaintiffs intended to cross the railway cannot affect the question, as they would, if entitled under the circumstances, be equally so entitled if they had no such intention, which would involve this anomaly, that if two highways formed a junction near the crossing, one running parallel to the railway, the other crossing it, the owner of a horse standing on the latter highway taking fright at an engine coming up, under the circumstances which occurred in this case, would be entitled to recover, whilst the owner of another horse, standing within a few feet of the first but on the other highway, could not; or if it be said that the owner last referred to is entitled to an action, it must necessarily lead to this further anomaly, that when a horse on a road running parallel to the railway is frightened by a train at a distance of eighty-one rods from the crossing, his owner is without remedy, whereas within the distance of eighty rods his right must depend on whether the whistle was sounded or the bell rung; although possibly the accident may have occurred from the circumstance that the whistle was sounded, and would not otherwise have occurred at all.

All statutes are to be construed so as to give effect to the intention as expressed by the words used in them, but that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words with reference to the subject matter, and the object with which the particular enactment was made.

Lord Justice Turner reviews the whole subject in *Hawkins v. Gathercole*, 6 DeG. M. & G. 21. "Regard," he says, "must be had to the intent and meaning of the

Legislature," and then refers with approval to the rule laid down in *Stradling v. Morgan*, Plowd, 204, where it is said: "That the Judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the intent was particular." And after referring to several cases concludes: "From which cases it appears that the sages of the law heretofore construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only: which expositions have always been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.

For the reasons I have mentioned I am of opinion that the general words used in this section must, having regard to the general provisions of the statute, be intended only for the benefit of those actually crossing, and injured when so crossing, or under such circumstances as I have before mentioned. The plaintiffs claim for a breach of a statutory duty, and that alone, and looking at the whole scope and object of the enactment, it being clear that it was not enacted for their benefit, they cannot claim damages for the breach of it.

On these grounds I think there was no case to go to the jury, and the plaintiffs should have been nonsuited.

The appeal therefore, in my opinion, should be allowed, with costs.

PROUDFOOT, J.—There was contradictory evidence as to whether the bell was rung or not. It was a question peculiarly within the province of the jury. Had the jury found a verdict for the defendants, there was evidence to support it and it would not have been disturbed. There was evidence enough to support a verdict for the plaintiffs. The learned Judge told the jury in unexceptional language that they were to make up their minds, “not merely as to the words of the witness, but as to the value to be placed on his testimony.” How is it possible to tell what value they placed on the witnesses except from the result of the action—a verdict for the plaintiffs?

The jury also found that the plaintiffs were not imprudent, that they used such care as a reasonably cautious person would, under the circumstances, have used in approaching the railway, and that had the plaintiffs known the train was coming they would have stopped the horse further from the railway. On all these questions I do not think we ought to interfere with the conclusion at which the jury arrived.

But it was argued that these all stopped short of what was necessary to entitle the plaintiffs to recover, and that the jury should have found “that the accident happened because the signal was not given.” It appears to me that this is the necessary result of the previous findings, especially when we take into consideration what was present to the minds of the jury when they retired to deliberate on their verdict. They would not have found a verdict for the plaintiffs, which they did, unless they had been of opinion that the want of the signal caused the accident. The learned Judge told the jury that the plaintiffs must satisfy them “not merely that the defendants neglected their duty, but that that neglect caused the injury.” And again, “it must appear that what happened to them was occasioned altogether by the fault of the railway company.” The charge and findings inevitably lead to the conclusion that the jury found that the accident happened because the signal was not given.

It was also urged by the defendants that it was the *appearance* of the train, not the want of the signal, that frightened the horse. But the signal is not given for the benefit of the horse, but of the driver, and it is found that if the signal had been given the plaintiffs would have stopped further from the railway; and on this rather indefinite finding the Court is justified in assuming that what was necessary to support the verdict was before the jury, and that this finding means that the plaintiffs would have stopped far enough away to prevent the horse from being frightened, or would have placed him where he would not have seen the train.

The question is then reduced to the construction of the statute C. S. C. ch. 66, sec. 104, upon which there was a difference of opinion in the Court below, the Chief Justice holding that the liability of the company only arose when a collision had actually taken place. It is not necessary to consider what the liability is in regard to horses being frightened on roads running near to and parallel with the railway, it will be time enough to determine that when the case arises. In this instance the plaintiffs were driving on a road that crosses the railway, towards the railway, and with the intention of crossing it, when the accident occurred. There is nothing in the Act to limit the liability to cases of collision. I agree in the construction placed on the statute by the majority of the Court of Common Pleas.

I think the judgment should be affirmed, and the appeal dismissed, with costs.

## POWELL V. PECK.

*Sale of Patent—Specific performance.*

The plaintiff, the owner of a patent for an improved pump which had only about a month to run, but was renewable for two further terms of five years each, sold the same; together with certain freehold and chattel property, to the defendants for \$4,500, of which \$1,500 was paid down, and a mortgage given on the property for the residue.

*Held*, [reversing the decree of the Court below, PATTERSON, J. A., dissenting], that under the circumstances appearing herein and in the Court below, 26 Gr. 322, all that the purchasers could claim was the right under the patent for the remainder of the first term of five years.

*Per* PATTERSON, J. A.—Under the agreement and assignment set out in his judgement, the defendants were entitled to the extension as well as to the current term.

This was an appeal by the plaintiff Powell from the decrees of the Court of Chancery reported, 26 Gr. 322, where, and in the judgments herein, the facts sufficiently appear.

The appeal came on for hearing on the 12th of May, 1881.\*

*Moss and Black*, for the appellant.

*Blake, Q.C., and W. Fitzgerald*, for the respondents.

*Gear v. Grosvenor*, 1 Holmes 215; *Besley v. Besley*, 9 Chy. D. 163; *Woodworth v. Sherman*, 3 Story 171; *Brooks v. Bicknell*, 4 McLean 64; *Manson v. Thacker*, 7 Chy. D. 620; *Case v. Redfield*, 4 McLean 526; *Hamilton v. Banting*, 13 Gr. 483; *McRae v. Froom*, 17 Gr. 357; *Hill v. Barclay*, 17 Ves. 56; *Maunsell v. Hedges*, 4 H. L. Ca. at 1056; *Carne v. Michell*, 10 Jur. 909; *Clum v. Krewer*, 3 Curtis 506; *Leake on Contracts*, 1159; *Bump on Patents*, 130 were referred to.

The points relied on appear in the judgments.

June 29, 1883. BURTON, J. A.—I have read and re-read the evidence in this case with the view of ascertaining whether it is possible in any way to reconcile the

\* *Present*.—BURTON, PATTERSON, MORRISON, JJ.A., and OSLER, J.

conflicting statements, but find myself unable to do so, or even to reconcile Mr. Peck's evidence with his own letters.

The impression I have formed upon it is, that neither of the parties at the time of the negotiations attached any great value to the patent, but that Powell was sharp enough to have the assignment of it executed and accepted by the defendant, acting upon the advice he had received, that the defendant would thereby be estopped after the expiry of the first term of the patent from disputing its validity.

It may be quite possible that Peck believed that, under the agreement of sale and the assignment founded upon it, he was obtaining the benefit of the patent for the full period for which it was renewable, *valeat quantum*; and I attribute his conduct after the receipt of Messrs. Fletcher and Caddick's letter, to the fact that he and Plews had placed a construction upon the writings unfavourable to their right to insist upon them as an assignment for any longer period than the first term of five years.

And this may go far to account for the defendant Peck's conduct at the subsequent stages of the transaction.

The learned Judge who tried the case experienced the same difficulty which we find in reconciling the evidence of both parties with their acts and with the correspondence, but that Peck was not a truthful witness is abundantly evident, and when we find him writing to the plaintiff in this strain: "As regards Plews and Kennedy your suspicions are unfounded, as I assure you they have neither directly or indirectly an interest in this purchase; they are the last men I would think of giving quarter to, as they come in direct competition with our own factory, and use contemptible means to enable them to carry on such competition. As to making an affidavit I think this is unnecessary, as my written word ought to be sufficient," when in point of fact he and Plews and Kennedy were at that time associated together with the view to the purchase, we cannot go far wrong when we refuse to attach implicit reliance to his statement.

It may be difficult to apportion the credibility to be

given to the statements of the parties on either side, when we have to rely on their verbal evidence, but *literæ scriptæ manent*; and it is safer to endeavour to extract from them such evidence as they present in support of their respective cases.

The plaintiff Peck bases his claim to relief on the following ground, to be found in the fifth paragraph of his bill. "The defendant represented and stated to your orators in the most positive terms, and assured your orators at the time of the same bargain, and the making of the said transfer of the 1st day of June, 1877, that the said Cone Patent would not expire for ten years and upwards, and your orators would not have entered into the said contract, or purchased the said right in the said patent, or agreed to pay the aforesaid consideration or purchase-money, but for the aforesaid statements, representations and assurances of the said defendant as to the length of time during which the said Cone patent would last," and shortly below he states that in the month of July, 1878, he for the first time became aware that the patent expired about the 19th July, 1877, and that Powell "had renewed the same in his own name for a further term, and thus and then did your orators learn that the defendant had deceived your orators in his representation in regard to the character of the said Cone patent, and that it would require the same to be renewed in order to extend it beyond the said 19th day of July, 1877."

Recent decisions have gone far to shew that the supposed equitable doctrine of making representations good in so far as it purports to establish any rule or principle apart from the ordinary rules as to the formation of contracts on the one hand, and the principle of estoppel by assertion as to existing facts on the other, is imaginary, and Mr. Justice Stephen, in referring to Lord Cottenham's words so frequently quoted from *Hammersley v. De Biel*, 12 Cl. & Fin. at p. 62, seems to consider them as meaning only that contracts of this nature—that is by representations made by one party for the purpose of influencing the

conduct of another and acted upon by him—may be made like other contracts by informal documents, or partly by documents and partly by conduct, *Alderson v. Maddison*, 5 Ex. D. at p. 299.

Here we have a transaction not in *fieri*, but closed and completed.

Whatever may have been the nature of the representation, and I shall presently refer to Mr. Peck's own evidence upon that subject, we find the parties on the 1st June as the result of the negotiations entering into a written agreement, in which the assignment of the patent does not occupy the prominent position now claimed for it, but after describing the sale of Powell's interest in the business and the land and buildings for \$4,500, partly to be paid in cash and partly by mortgage on them and the chattels, no security being taken on the patent, the interest in the patent is thus referred to: "Powell to assign his interest in the pump patent to Mr. Peck for the counties," &c.

The actual assignment, which was prepared by Powell himself, and not executed until the 23rd June, grants all his interest—to the full end of the term for which the said letters patent are granted.

Now, I can understand that if Powell had purely made a verbal representation that he held a patent having ten years to run, and that the person to whom that representation was made upon the faith of it had paid his money, that would be a contract for the sale of a patent answering that description, which the vendor would be bound to carry out or answer in damages. But whatever were the representations in this case they were not acted upon directly, but the parties entered into a written agreement for the sale and purchase to be carried out afterwards by the necessary conveyances, and I adopt the rule laid down by Malins, V. C., in cases of this nature, in *Allen v. Richardson*, L. R. 13 Ch. D. 536, which, as he says, cannot be too rigidly adhered to: "That in all the transactions of life, whether it be a sale or a purchase, you must, if you are wise, be wise in time. Therefore, in a case of vendor



and purchaser, which necessarily involves the investigation of title—an investigation whether the vendor can give the purchaser all he has contracted to give and upon which alone being satisfied the purchaser pays his purchase-money—if he is to be wise he must be wise in time, and he cannot be wise in time, unless he objects before he completes the contract.” The defendant Peck was then represented by a solicitor, and he could then have ascertained (if this patent was really the inducement for entering into the contract as represented) whether it had the length of time to run to which so much importance was attached, and could have secured a transfer of it in proper form.

Instead of that the actual assignment was not much, if at all, pressed, and would probably never have been executed if Powell himself had not for purposes of his own seen fit to execute it. The representations have little to do with the actual ground of complaint, which is attributable to the defendant's own neglect in omitting to obtain a proper transfer.

But if these representations were relied on at all, which I think doubtful, I should think that in a case of this kind, where the contract has been carried out by the execution of the deed, the evidence ought to be of the most convincing character.

What then upon the evidence was the representation? I do not think it necessary for such a purpose to travel out of the evidence of the defendant; he knew, if any one did, upon what representation he acted better than any one else could know. This is the way in which he narrates it:

“Q. What did you say; what were your exact words? A. I think I said, how long has the patent to run? I think (these) were about the words I used. Q. And what did he say? A. A little over ten years. Q. And these were the exact words he said? A. I think it was. Q. Had you ever asked him before that how long the patent had to run? A. Yes, I think it was referred to in the first conversation with Mr. Coleman. Q. What did you ask him on the former occasion? A. I would not swear I asked him how long it had to run, but we had talked about buy-

ing the patent for the five counties. Q. What was said on the first occasion? A. Well, it is hard to say, but I would not be positive, but I asked him then; I would not say that I did not. Q. And what was his reply then? A. He always represented the one thing. Q. I want to know his reply on that occasion. A. Well, he always represented——. Q. What was his reply, you say that you recollect asking him? A. Well, he said that it had five years to run. Q. He said that on the first occasion? A. Yes. Q. You are quite sure of that, now? A. Yes, I am pretty sure. Q. Sure enough to swear to it? A. Well, that's going pretty far. Q. Why did you ask him on the second occasion if he told you on the first occasion. A. I cannot tell what was running in my mind. Q. Had you forgotten? A. I do not know as I had forgotten. Q. But you knew how long it had to run on the second occasion."

What misrepresentation was there here? It may or may not be that both parties understood that what they were bargaining for was not the unexpired portion of the five years, but for the whole period. The defendant certainly, if he thought about it at all, did not intend to bargain for the few days that the first term had to run, but if he had used the most ordinary caution he would have ascertained what both understood when he completed the arrangement by the actual transfer.

But the subsequent conduct of the defendant is inconsistent with the claim now alleged.

On the 25th July, 1878, defendant Peck was called upon to pay the instalment due on his mortgage, and at the same time informed of the plaintiff's claim for royalties. Does he indignantly remonstrate with him for having set up an unfounded claim, which one would expect to find if any such representation had been made? Is his not rather the conduct of a man who discovering that by reason of his omitting to call for what he was entitled to, or admitting that he has all he was entitled to under his agreement, finds himself exposed to a claim which he had overlooked.

I think that in the case of a completed contract of this kind the evidence is not of a character to establish a false

representation, even if that doctrine was applicable to such a case as the present, upon the facts.

I think, however, the representation even if made was substantially correct, as Powell was entitled as of right to two renewals of the patent, covering the full period of ten years. The difficulty has arisen entirely from the defendants and their advisers omitting to call for the production of the patent, and securing a transfer of the present and a covenant to transfer the future terms.

It may be that under this agreement Powell may be a trustee for Peck of the renewal term. No such case is made on the pleadings, and it does not necessarily call for any expression of opinion now.

I cannot close without referring to the untruthfulness of the allegation made by Peck in his bill that he only became aware that the patent had not ten years to run in July, 1878, in the face of his evidence that he was applied to by Powell shortly before the first term expired for the fee to renew it, which he refused to give, although in common fairness he should have borne his proportion of the renewal fee.

I think that both appeals should be allowed, with costs; and a decree made in *Powell v. Peck* in the terms of the prayer of the bill.

As to the cross relief for the \$150, respondent paid the amount expressly on account of the royalties claimed, and it is so utterly untenable that I am not surprised at its being passed over by the learned Chief Justice without remark.

PATTERSON, J. A.—The bill of *Powell v. Peck, Coleman, and Brett*, was filed on the 13th September, 1878; that of *Peck and Coleman v. Powell* on the next day. Powell's bill asks for a decree for payment of money secured by a mortgage for \$3,000 made 1st June, 1877, by the defendants to him, payable in three annual instalments of \$1,000, on 1st June, 1878, 1879, 1880; or in default for a sale of the lands. The defendants to

that bill answer that they bought the land, together with the stock, plant, machinery and good-will of a business of pump-making, and the plaintiff's interest, so far as it related to the Counties of York, Halton, Peel, Simcoe, and Ontario, in a patent for a kind of pump called the Cone pump, which was made at the factory they were purchasing, for \$4,500; and the mortgage in question, together with a chattel mortgage on the stock, plant, and machinery, were given to secure \$3,000 of that purchase money: that the plaintiff represented to them that the patent would continue for ten years and upwards, and they paid their money and gave the mortgage on faith of that representation: that they discovered in July, 1878, that the patent expired on 19th July, 1877, and that the plaintiff had renewed it in his own name for a further term: that they paid part of the instalment which fell due on 1st June, 1878, and gave a promissory note for \$735, which was the balance including interest, which note fell due on 11th September, 1878, and not being paid, the plaintiff on the following day seized the machinery, &c., under his chattel mortgage. They say they did not pay the note in consequence of the facts stated respecting the deception in the matter of the patent. They further set out the filing of Peck and Coleman's bill against Powell, on 14th September, 1878, which set out the same facts relied upon in this answer and prayed, *inter alia*, that Powell might be ordered to make good his representations by transferring the patent for the residue of the term of ten years, and restrained from attempting to levy the purchase money until he should have done so; and shew that an interim injunction had been obtained in that action, on terms of paying the \$735 into Court which had been done.

They say further, that their bill had been served together with notice of motion for the injunction, before they were aware of the filing of Powell's bill.

They pray, by way of cross-relief, for the same relief asked in their action.

There is another claim made for a sum of \$150, which

Peck is said to have given Powell on a negotiation for the purchase by Peck from Powell of the patent for the Dominion of Canada, and which Powell is alleged to hold without consideration.

The actions were heard before the present Chief Justice of this Court, when Chancellor. He dismissed Powell's bill; and in the other action he ordered Powell to assign and transfer to the plaintiffs the "Cone Patent" for the period of five years from the 19th July, 1877, for the five counties, and to do all things necessary to extend it for the further period of five years, from the expiration of the current term thereof, and to convey the extended term to the plaintiffs.

From those decrees Powell appeals to this Court.

The patent was issued to Powell on 19th July, 1872, under the Patent Act of 1869, 32 & 33 Vict. ch. 11. It was for the period of five years, under sec. 17 of the Act, which provided that patents of invention or discovery issued by the patent office should be valid for a period of five years; but at or before the expiration of the said five years the holder thereof might obtain an extension of the patent for another period of five years, and after those second five years might again obtain a further extension for another period of five years. By sec. 18, the instrument for granting the extension, being prepared as directed, was to be signed and the seal of the patent office affixed thereto, and being duly registered became available to the grantee thereof, and was to be delivered to him. Equivalent provisions are contained in secs. 17 and 18 of the Patent Act of 1872, 35 Vict. ch. 26, which did not come into force till after the patent in question was issued.

Powell therefore had, by virtue of his letters patent, the monopoly for five years from 19th July, 1872, and the right to extension for two further periods of five years.

He thus occupied a position different from that of a patentee under the English law or under that of the United States, and different from that which would have been enjoyed under the patent law in force in the Province of Canada from 1848 until Confederation.

The United States Act of 1836, ch. 357, sec. 18, and the Act of the Province of Canada, 12 Vict. ch. 24, sec. 11, which was copied from it, provided for an application by the patentee for an extension of the original term of fourteen years for a further period of seven years, and constituted a board to hear and decide upon the application, and any objection there might be to it. The extension was to be granted if, upon a hearing of the matter, it appeared to the board, having due regard to the public interest therein, that the term should be extended, by reason of the patentee, without fault on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity, and expense bestowed thereon, and the introduction thereof into use; and it was provided that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein."

It was decided in the Circuit Court of the United States, by Mr. Justice Story and by Mr. Justice McLean (*Woodworth v. Sherman*, 3 Story 179; *Brooks v. Bicknell*, 4 McLean 64,) and afterwards by the Supreme Court of the United States (*Wilson v. Rousseau*, 4 Howard 646), that an assignee under the original term acquired no right, by virtue of that assignment only, in the extended term.

The reasoning upon which this construction was maintained in the Supreme Court is founded to a great extent upon the declared policy of the enactment, which is to secure remuneration to the inventor, and not to benefit the assignee, who has enjoyed all that was assigned to him.

That reasoning appears to me satisfactory, and I have no difficulty in assenting to it.

Stress is also placed upon the limitation, by the terms of the clause, of the right of the assignee to the use of the thing patented, not extending the right to the making or vending of the invention. The process of criticism applied to this portion of the clause for the purpose of discovering the extent of the benefit intended to be taken by the

assignee may be a little refined, but it is foreign to the purpose for which I am referring to the Acts.

The Act of Congress, 1861, ch. 88, sec. 16, gave to all patents thereafter granted a duration of seventeen years, and prohibited all extension of them.

The English Law on the subject is found in the Statute 5 & 6 Wm. IV., ch. 83, which authorized an application for an extension of term by petition, and provided a tribunal for hearing all parties interested, viz., the Judicial Committee of the Privy Council; in 2 & 3 Vict. ch. 67, which gave further power to the Judicial Committee: and in 7 & 8 Vict. ch. 69. which, amongst other things, provided, in sec. 4, in order to remove doubts which had arisen touching the power given by the Act of Wm. IV. in cases where the patentees had wholly or in part assigned their right, that the extension might be granted either to an assignee or assignees, or to the original patentee or patentees, or to an assignee or assignees and original patentee or patentees conjointly.

The Act 15 & 16 Vict. ch. 83, makes a number of changes and amendments, but by sec. 40 preserves the provisions to which I have adverted respecting extensions.

We thus perceive the difference between our system and the others, and the distinction which makes the reasoning on which the American decisions to which I have alluded inapplicable to assignments of patents under our law.

With us the right of extension is secured by statute, and is secured to the *holder of the patent*, whether he happens to be the patentee or his assignee. In the other countries the extension cannot be insisted on as a right, but is a boon to be accorded or withheld after investigation of the grounds on which the claim is made; and the grant, if made, is for reasons which in the United States are personal to the patentee, and which, alike in that country and in England, must be based on affirmative proof of something more than the existence of the original patent.

When Powell by his agreement of 1st June, 1877

undertook "to assign his interest in his pump patents to Mr. Peck, for the counties of York, Halton, Peel, Simcoe, and Ontario;" and when, by his deed of the same date, he granted, sold, and set over to Peck, Coleman, and Brett, "all the right, title, and interest, which I have in the said invention, as secured to me by said letters patent for, to, and in the limits of the counties of York," &c., he parted with all his interest, so far as those five counties were concerned; and that part of his interest, and in fact the only substantial part which existed when he executed those documents, was the statutory right of extension. The deed has a habendum "to the full end of the term for which the said letters patent are granted, as fully and entirely as the same would have been held and enjoyed by me had this grant and sale not been made, save and except such portions of the above territory as may have been sold by the patentee before the 1st day of April, 1877."

This has not the effect, in my opinion, of restricting the previous grant to the term existing at the time, so as to exclude the grantee from the right of renewal or extension. On the contrary, I take it to make it more clear that, within the limits of the territory described, the grantor divests himself of all title up to the last moment of the current term, and thus to affirm the status of the grantee as being at, as well as before the expiration of the term of five years, *the holder* of the patent, and the person entitled under sec. 17 to the extension so far as the right had relation to that territory.

One section of the statute of 1872, viz., sec. 22, which is identical with sec. 22 of the Act of 1869, seems, at first sight, to make a distinction between an assignment of part of one's interest in a patent, and a grant of territorial rights under it. It provides that every patent for an invention, whensoever issued, shall be assignable in law, either as to the whole interest or as to any part thereof, by any instrument in writing; but such assignment, *and also* every grant and conveyance of any exclusive right to make and to use, and to grant to others the right to make and use the invention patented, within and throughout Canada or



any part thereof, shall be registered in the office of the commissioner.

So far, although one may not readily perceive the difference between an assignment of a patent and a grant of the exclusive rights which it secures, the terms of the enactment appear to recognise some such distinction; but that no such distinction is intended is apparent from the remainder of the section, which declares what the effect of the registration is to be, and embraces instruments of both kinds under the word "assignment." The words are, "and every assignment affecting a patent for invention shall be deemed null and void against any subsequent assignee, unless such instrument is registered as hereinbefore prescribed before the registering of the instrument under which such subsequent assignee may claim."

The result of these views of the statute and the documents is that the decree made by the learned Chancellor upon this branch of the case should be upheld, without necessary reference to the particular grounds upon which, after a careful and exhaustive consideration of the evidence, he based his decision. The considerations which I have been discussing were not overlooked by him, although, having formed a clear opinion upon other grounds, he adverted to them but slightly. They have seemed to me so decisive as to render it unimportant to undertake an independent inquiry whether the intention to sell the right to the extended term, or the representation that such was the case, is established by the other evidence before us. No doubt there are difficulties in one's way, chiefly arising from the conduct and dealings of the parties at dates later than those of the documents. These difficulties do not lie in the way of one party only. They are distributed with some impartiality on both sides. The learned Chancellor has grappled with them, and has come to a conclusion in accordance with what commends itself to me as the justice of the case, but which, as I have not worked it out independently, and as it is not the conclusion which my learned brothers have reached, I do not venture to pronounce upon more definitely.

I have now to consider whether the facts which seem to me to be established warrant the decree.

Powell having taken out the extension in his own name for the whole Dominion, ignoring the title of Peck and Coleman, (Brett having released his interest to them,) he is properly ordered to execute whatever instruments and do whatever acts may be necessary to restore to them their title, and to furnish proper evidence of it.

The apprehensions indicated by one of the grounds of appeal, that the remedy on the mortgage may, by the decree as framed, be tied up for five years, are I think unfounded.

All that is required by the decree may be done at once by an instrument duly executed and registered which will designate the assignees as the persons entitled to both extensions. This would satisfy the terms of the decree, notwithstanding that that document may have been drawn with the idea, in the mind of the draftsman, of the patentee obtaining the extension in his own name and afterwards executing a new assignment.

As to the dismissal of the bill in *Powell v. Peck*. If I am right in holding that Powell, the mortgagee, withholds part of the consideration for the mortgage, there is no good reason shewn why he should be aided by the Court in enforcing his security.

It is true the bill might have been retained with a view to the disposition of the money paid into Court as soon as the plaintiff shall have made good his part of the contract. I see no objection to that being done, although I think it an indulgence which should only be asked by one who comes into Court with clean hands. If the appellant desires the decree to be varied to the extent of retaining the bill for a limited time, I should be disposed to concur in doing so. That will not affect the disposal of the appeal, which I think should be dismissed, with costs.

The respondents ask, by way of cross relief or counter claim, for payment of \$150, which they say one of them paid Powell upon a consideration which failed, but which,

so far as I understand it, was not otherwise connected with the transactions in question in the suit than as being a negotiation for the purchase of a more extensive interest in the same patent than that which has been in question. I do not find that any adjudication upon this claim was made in the Court below, and I do not see that a case has been made out for our awarding the money in this suit to the one defendant who asks for it. If there is any apprehension that the claim, having been advanced in the answer, may be treated as *res judicata*, I suppose the defendant may, in case the decrees are to be varied, have a declaration inserted that his claim is not prejudiced by the decree.

MORRISON, J. A., concurs in views expressed by BURTON, J. A.

OSLER, J.—In the pleadings, the title of Peck and his co-suitors to relief is put entirely on the ground—not that there was an agreement to assign a right to the patent for ten years—but that Powell “represented that the patent which he held had ten years to run before it would expire,” and they allege that they would not have entered into the contract set forth between Powell and themselves, but for the statements, representations and assurances of Powell, as to the length of time the patent would “last.”

It is not set up on the pleadings, nor was it contended at the trial, so far as I can gather from the evidence and the judgment in the Court below, that the agreement and assignment of the 1st of June, 1877, are, or either of them is sufficient to transfer Powell’s rights under the extensions of his patent.

That contention was raised for the first time in the reasons against the appeal, and it was not strongly insisted upon in the argument. Certainly no attempt was made to shew that the American cases relied on by counsel for Powell, as proving that the operation of such an agreement as the one in question is limited to the existing or original term mentioned in the patent, turned upon the

language of the 18th section of the United States Patent Law of 1836, and were therefore inapplicable as guides to the construction of the Canadian Acts of 1869 and 1872.

On a comparison of these Acts with our former Patent Act, Con. Stat. Can. ch. 34 s. 16 (12 Vict. ch. 24, sec 11), and with the American Patent Law of 1836 (now no longer in force), I cannot say that under our present law the limited construction contended for must *necessarily* be placed upon an agreement framed in the terms of that of the first of June, 1877. The utmost that can be said of it is, that it is ambiguous, and may be shewn to embrace the interest in subsequent terms as well as the existing one, according to circumstances.

It is unnecessary to decide whether a person taking under such an instrument, is the *holder* of a patent, so as to be entitled under sec. 17, to an extension in his own name. Looking at that section and section 22, it is evidently intended to distinguish between an assignment of the whole or any part of the interest in a patent, and a grant or conveyance of the exclusive right to make and use, and grant to others the right to make and use the invention patented throughout Canada, or any part thereof, the latter relating only to the territorial or local user of the invention—(Curtis, 211, 212).

But whatever may be said of the language of the agreement, the actual assignment of the patent, which bears the same date, although executed subsequently, is very differently expressed, and as I venture to think uses apt and precise words, limiting the interest assigned to the existing term of the patent.

If there had been no question as to the subject matter of the contract in this particular, or if it had been made out that Peck was induced to enter into the contract by the alleged representation as to the term of the patent, I should agree that he was entitled to relief to the extent of reforming the assignment, by making it correspond with the agreement, or by compelling Powell to make good his

representations, or failing his ability to do so, by rescinding the whole contract.

Then how does the case stand? Powell has executed an assignment in accordance with his view of their agreement, and of what he meant and had agreed to convey. Peck, on the other hand, contends that the assignment is only a partial execution of the real contract, or if a complete execution that he was induced to enter into it by an untrue and material representation concerning it.

His subsequent conduct appears to me to shew that his contention is not well founded in either respect.

It is difficult to believe that in the agreement of the 1st of June, respecting the sale and purchase of Powell's business and premises, the patent in question was seriously taken into account as being of any special value. It was then to Peck's knowledge being infringed on all sides, and he did not stipulate for any covenant or guarantee from Powell as to its validity.

In July, 1877, after the assignment had been delivered to him, he knew from Powell himself that the existing term, which was all he took under it, was about to expire, and that Powell intended to renew the patent in his own name, yet he neither registered his assignment, nor asserted nor took any proceedings to vindicate his title to a more extensive interest than the assignment conferred upon him.

On the 1st June, 1878, the first instalment of \$1,000 became due on the mortgage given for the balance of the purchase money, under the agreement of the 1st June, 1877. Knowing that Powell had renewed the patent in his own name, Peck, paid a part of this instalment, and gave his note, payable in three months, for the balance with interest.

On the 25th August, 1878, Powell wrote, demanding payment of royalties for the use of the patent for all pumps made or sold since the extension of the patent in July, 1877, and threatening legal proceedings. There does not seem to have been any immediate reply to this letter, but on the 1st August, 1878, Peck wrote to Powell, offering

\$4,000 for the patent in question, and all other pump patents he had for the Dominion, except British Columbia, and he says: "It is understood that this offer includes all renewals and extensions, and all the equities pertaining to these patents, and also all royalties for pumps sold up to this date."

The correspondence was continued down to the 13th August, before which time Powell had offered to accept \$150, in settlement of his claim for royalties, and Peck, without having intimated by a single word that the claim was not well founded, had paid him that sum for them and received a receipt therefor from Powell, expressed to be "in full of royalties on pumps made under my patent, known as the cone pump and its connections, since the renewal of these patents to me, and since their license to make the same expired in July, 1877. With the understanding that parties keep an account at a rate to be agreed on, if aught should occur to prevent the bargain now under negotiation between us from being carried out."

This receipt was sent in a letter of Powell's of the 10th August, in which difficulties are raised by him as to accepting Peck's last proposal for the patent without some definite assurance that he is not acting in the interest of, or purchasing the patent for, Powell's rivals Plews and Kennedy, against whom moreover, an action was then pending at Powell's suit for its infringement.

On the 13th August, Peck replied to Powell's letter of the 10th, answering his objections and requisitions; falsely assuring him that Plews and Kennedy had neither directly nor indirectly an interest in the purchase, and concluding: "Now, if you mean to sell to me, say so, and let us have the matter closed; and if you don't mean to sell, say so, and we will drop it, and I will go and attend to my business." There is a postscript to this letter, which, in view of his subsequent proceedings, is significant: "I have not seen Mr. Davis (his solicitor) since receiving your last letter."

If evidence of conduct, indicated by acts, silence, and

written statements is entitled to weight, can we have anything much stronger and more conclusive than the foregoing facts and correspondence to shew that Peck was conscious, not only of the justice of Powell's demand for royalties, and, therefore, that there had been no such agreement as he now sets up, but also that he had never been misled by any representation as to the actual term or period of the patent?

If it be said that the royalties were paid as subsidiary to or in connection with the negotiation for the sale of the patent, the extract I have quoted from Peck's letter of the 13th August, supplies the answer.

Writing with Powell's receipt before him, he speaks of the matter being dropped if Powell does not mean to sell, yet there is no suggestion that in that event the \$150 should be returned, or that it had been paid on any other footing than that already mentioned.

It is true that after he had seen his solicitor, Mr. Davis, on the same day (13th August) in order to procure a letter corroborating the false statement already made, denying his collusion with Plews and Kennedy, there was an attempt made by the former (the solicitor), who at this stage takes up the correspondence, to treat the \$150 as having been paid on account of purchase money, but the evidence of Plews and Kennedy shews that this was done merely to support a scheme suggested by the solicitor, by which a contract for the sale of the patent was to be fastened upon Powell, because of his acceptance of part of the price. To this scheme Plews and Kennedy refused to lend themselves, knowing that the money, part of which they had themselves advanced, had been paid on account of royalties.

Their evidence is also important as shewing the slight value formerly attached by Peck to the patent, and his view of the agreement, and the interest he took under it, and also as corroborating Powell's explanation of his request, that Peck should advance or pay the fees for the renewal of the patent.

I do not know that it is necessary to explain or reconcile all the inconsistent statements and facts which are to be found in the enormous mass of evidence presented to the Court. Each party has acted uncandidly, and with an evident desire to take advantage of the other. What I go upon in adopting the view adverse to Peck's case is this, that his course of conduct, taken as a whole, has, from first to last, been inconsistent with his present contention.

In any case, I should have thought it right that Powell's bill should not be dismissed, but that it should be retained, and the time for payment of the mortgage money stayed until performance of the decree in *Peck v. Powell*,

For the reasons already given, however, I am of opinion, with great respect, that both appeals should be allowed.

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The sons also bought the chattel property, and amongst the rest Alfred bought the horse now in question for \$50. The horse was kept on the place, very much as he had always been, Alfred using him in the work of the farm, and occasionally working for other people with him for hire, and the father sometimes driving him in his own buggy or cutter, and for his own purposes. The purchase of the chattels is said to have been made after the sons had possession of the farm, but before they received their conveyances.

I do not allude to the evidence, of which there is some, tending to impeach the *bona fides* of the sale. I am referring only to facts on the side of the plaintiff, who has the verdict, of which there is distinct evidence.

The learned Judge left the case to the jury, with a charge which is not complained of, and which was certainly not open to complaint on the part of the defendant. The two essential requisites, viz., the reality of the sale from the father to the son, and the actual and continued change of possession, were clearly explained. On the latter point the jury were told the change of possession must be such as that the public could see that they were dealing with some other party than the original owner; and that if the property remained to all appearance the same as before, upon the place, then there would be no actual and continued change of possession, notwithstanding that there might be a secret agreement between the parties. Further observations were made, as noted by the short-hand writer, enforcing the same views of the law; and, in conclusion, the following summary of the charge was delivered:—  
“ You will say whether it was an actual sale; if you find there was no actual sale, then your duty is ended. If, on the other hand, you find there was a sale, it is your duty to find whether there was actual and continued change of possession sufficient to take it out of the statute.”

The jury found for the plaintiff, each man, on being polled, speaking for himself.

The principal point relied on before us for the defen-

dant was, the supposed insufficiency of the evidence of change of possession. There clearly was evidence of actual change of control as between the father who sold, and Alfred who bought and used the horse. The criterion adopted by the learned Judge, in his charge, of the sufficiency of the change to satisfy the statute was the visible and apparent character of the possession. He held that, notwithstanding the *bona fides* of the transaction between the parties and the actual relinquishment by the father to the son of the possession of the stable and what it contained, yet there might be, by reason of the father's continued residence in the dwelling-house, and his presence about the place, and perhaps his occasional user of the horse, such a continuance of the old possession, in the eyes of the public, who knew it had once been the father's and saw nothing to indicate a change, as to require the registration of a bill of sale. I am not quoting the learned Judge's language. I state what I take him to have conveyed to the jury. He went even farther, for he told the jury, not merely that the apparent identity of the possession might countervail the actual change, but that they ought not to find that there was a change unless it was visible and apparent to the public.

I agree with the doctrine thus laid down. I think the object and purpose of the Act, which is to strike at secret conveyances, requires that the change of possession shall be no secret.

But I think that while the charge was just what it should have been if credit had been given or the statute was being asserted by one who dealt merely as one of the public, with no greater means of knowledge than the public generally had, the charge might have been put in a shape much less favourable to this defendant, who was son of his judgment debtor and brother of the owner of the stable and the horse, and the dwelling-house, and who lived at no great distance from them.

Notice or knowledge of a conveyance of chattels may not prevent a creditor or purchaser invoking the aid of the

statute in case there has been no registered instrument and no change of possession. But where there has been an actual sale, and between the parties an actual change of possession, knowledge of that change of possession by a particular creditor must be sufficient as to him, whether the rest of the public knew of it or not.

I think the jury might very well have been told that if this defendant knew of the real state of things between his father and his brother, including the change of possession which the jury believed to have actually existed, it was immaterial whether or not that change was apparent to casual onlookers; and having regard to the relationship of the parties, and to the fact, which is in evidence, that the father was no longer the housekeeper, but was maintained by the sons, who kept the house, and having regard also to the absence of anything said by the defendant in the witness-box to negative such knowledge on his part, or to assert a belief that the horse was still the father's, I am of opinion that the jury would have been warranted in finding that the defendant knew all about it.

At all events, I feel no doubt that it could not have properly been laid down as law that on the facts in evidence the verdict ought to have been different; and that is sufficient for the purpose of the case before us.

The weight of evidence is not so much on the defendant's side as to call for our interference. It would not be so if the case were the ordinary one of credit given in reliance on the apparent ownership of property. But in a case where the only debt is for the costs of the defence of an action between father and son, a debt which first existed when the judgment was entered, and which we have no reason to suppose was contemplated till the trial at which the father failed, an overwhelming preponderance of evidence would be necessary.

One ground of appeal is based on the alleged fraudulent character of the transaction between the father and Alfred. I find no evidence on which I could say that any such fact would be at all strongly supported, much less that a verdict

which negatived it was wrong. But I do not gather from anything before us that the point was made at the trial. As far as one can glean the dates from the evidence, the sale of the horse must have been at least two years before the defendant was a creditor.

I have no doubt that we should dismiss the appeal, with costs.

SPRAGGE, C. J. O.—I quite agree with my brother Patterson in his conclusion in this case, and that the defendant had certainly nothing to complain of in regard to the way in which the question of change of possession was left to the jury. And I do not dissent from the opinion expressed by my learned brother in approval of the Judge's charge. I desire only to observe, that I think that, under the circumstances appearing in this case, the learned Judge might well have told the jury that not only was there an actual change of possession as well as of ownership, but also that it was reasonable to assume that it was known to George.

BURTON, J. A., concurred.

*Appeal dismissed, with costs.*

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SILSBY V. THE CORPORATION OF THE VILLAGE OF  
DUNNVILLE.

*Municipal corporations—Contract not under seal.*

The defendants agreed, subject to certain tests and approval, to purchase from the plaintiffs a steam fire engine, which it appeared it was desirable the municipality should possess; but on submitting a by-law for that purpose to the ratepayers for approval, the same was rejected, although an informal by-law had been previously approved of by them. Meanwhile the engine had been received by the defendants, and by them subjected to the necessary tests, which being satisfactory they, by a minute in council, agreed to accept the engine, and the same was placed in their engine-house, subject to the customs duties thereon.

A few days after, on ascertaining the result of the voting, the defendants communicated the same to the plaintiffs, rescinded the resolution, and requested them to remove the engine, which the plaintiffs declined to do, and sued for the price of the engine:

*Held*, [affirming the judgment of the Court below, 31 C. P. 301] that the plaintiffs were not entitled to recover; the contract for the purchase of the engine not having been under seal, and there having been no formal acceptance of it under seal; and the purchase thereof not being a matter of such minor importance or daily occurrence as should be binding on the corporation without the formality of a seal: and

*Quære*, whether the defendants would necessarily be liable upon a contract not under seal, even where the benefit of it had been actually enjoyed, unless in cases where the thing ordered was actually and urgently required or "for work which if the corporation had not ordered, they would not have done their duty."

*Pim v. Ontario*, 9 C. P. 304, remarked upon.

THIS was an appeal by the plaintiffs from the judgment of the Court of Common Pleas, reported 31 C. P. 301, where the facts and circumstances of the case are fully set forth:

The grounds of appeal assigned by the plaintiffs were:

- (1) That the evidence shewed that the plaintiffs had fully executed the contract on their part, and the defendants were therefore bound, even if there were no contract under seal.
- (2) That the evidence shewed that the defendants had accepted the engine, and were therefore bound, although there was no contract under seal.
- (3) That the evidence shewed that the defendants had used the engine for their own purposes, and enjoyed the benefit of it, and were therefore bound by the contract, though not under seal.
- (4) That the evidence shewed that the engine was necessary for the purposes of the corporation; and therefore the corporation were liable, even if no contract under seal.

(5) That the by-law of the 28th day of August, 1879, passed by the ratepayers, having recited that a steam fire engine was necessary, the defendants were estopped from denying that the engine delivered was a necessity. (6) That such by-law was binding on the council to purchase a steam fire engine, and the council in making this purchase from the plaintiffs were fulfilling a duty, cast upon them. (7) That the resolution passed under that by-law, accepted the engine and appliances subject to certain tests, and by a further resolution, after reciting that the engine had proved satisfactory, the defendants finally accepted the same; such a resolution of acceptance being binding on a municipal corporation even if not under seal. (8) That the plaintiffs having been notified that the defendants had accepted the engine by resolution, were entitled to presume that the resolution had been regularly passed, and the defendants could not take advantage of their own irregularity in not affixing the corporate seal. (2) That the evidence established that the engine enabled the defendants to derive such benefit as to entitle plaintiffs to sue as upon an executed consideration. (10) That the evidence did not warrant the Court in finding that the resolution of the council, stating that the engine having stood the test and proved satisfactory the same was accepted, was not final, and was subject to the condition that the by-law should be approved of by the ratepayers, and the defendants should have been held estopped by such resolution from disputing its finality; and further, that the evidence proved that the engine was delivered and accepted under and pursuant to the by-law, of August, 1879, which was valid and binding on the defendants, being cured by the 43 Vict. ch. 25 (O.)

The reasons assigned by the respondents in support of the judgment were: that the first by-law, passed in August 1879, was invalid in as much as the same was passed prematurely, and did not comply with the provisions of the statute, 42 Vict. ch. 31, sec. 10, and was not made valid by statute, 43 Vict. ch. 25, and such by-law was expressly repealed by resolution under the seal of the

defendants; and that there were no funds in the hands of the defendants at the time of the alleged contract, and no valid by-law in force, under which the defendants could have procured or raised moneys, and therefore the defendants could not contract with the plaintiffs as is alleged: that there never was any valid contract for the purchase of the engine, nor any valid acceptance thereof, nor any acts or conduct of the defendants that amounted to an acceptance or estopped them from saying that the same was not accepted; and that the defendants could not be held liable on the first count for not accepting the engine in the absence of any valid contract.

The appeal came on to be heard before this Court on the 9th of February, 1882.\*

*McCarthy*, Q.C., and *Nesbitt*, for the appellants.

*Bethune*, Q.C., and *A. Bruce*, for respondents.

The authorities cited are mentioned in the former report.

March 24, 1883. BURTON, J. A.—This is an action against a municipal corporation for the price of a fire engine.

The declaration contains a count upon an executory contract and the common counts. It is upon the latter that the plaintiffs chiefly base their right to recover, and to this the defendants plead never indebted, and a special plea, to the effect that the plaintiffs' claim is for and in respect of a debt incurred and falling due in 1879, which was not within the ordinary expenditure of the corporation during that year, and that no estimate was made by them, nor any assessment made, nor any by-law passed for the creation of the debt or imposing a rate for the payment of it, and no such rate was imposed, and that the defendants had no moneys from which to pay it.

The council appears to have passed a resolution as early as the month of July, that it was desirable for the protec-

\* *Present*, SPRAGGE, C.J.O., BURTON, PATTERSON, J.J. A., and ARMOUR, J.

tion of property in the municipality to purchase a fire engine, and to submit a by-law to the electors for their ratification.

A by-law was accordingly submitted and ratified by the ratepayers, and finally passed by the council on Aug. 28th.

This by-law proved, however, to be invalid, inasmuch as it did not comply with the requirements of the statute 42 Vict. ch. 31, sec. 10 (O), and it became necessary to introduce another, and the council went through the form of repealing it by a resolution under the seal of the corporation.

The second by-law was defeated on its being submitted to the ratepayers on the 28th November.

Previously to the passing of the first by-law the council had been in correspondence with Messrs. Hyslop & Ronalds in reference to the purchase of a fire engine from them; but after its passage the present plaintiffs came upon the scene, and made a proposal to the council for furnishing one of their make, which resulted in the council authorizing three of their body to proceed to the plaintiffs' manufactory at Seneca Falls, in the State of New York, to examine and report.

On October 27th a resolution was passed accepting the tender of the plaintiffs, subject, however, to the full approval of the council upon public trial and test.

The tests were proceeded with, and a favourable report received, and on the 24th November, the council accepted it, and agreed to take the engine.

On the 28th, as I have already stated, the by-law was defeated at the polls, and on the following day a resolution was passed rescinding that of the 24th under which the council had agreed to accept the engine.

The reeve notified the plaintiffs on the 1st December, of the fate of the by-law, and stated that after so emphatic an expression by the ratepayers the council deemed it improper to proceed with the purchase, and had accordingly rescinded the resolution.

The plaintiffs had, however, sent the engine to Dunnville about the 10th November, and it had been submitted to the



test whilst there, and after the test it still remained under the control of the plaintiffs, although placed by them in the fire hall of the corporation.

The hall was under the care of a person of the name of Sterton, who was in the employ of the corporation, and he charged and received payment from the council of a small sum (\$12.80) for taking care of this particular engine. He claimed that he had been put in charge of it by a member of the council, and so the account was passed, but the council passed no resolution to that effect, and the engine was never used for the purposes of the town, and until some time in January could not be delivered, as it was subject to the duties.

The plaintiffs' right to recover on the common counts must depend not on whether the defendants did in point of fact accept the engine, but on the question of whether it was accepted in the sense of their having actually enjoyed the benefit of it. I am not at all prepared to say, upon a consideration of the recent decisions, that a municipal corporation would necessarily be liable under a contract not under seal where the benefit had been actually enjoyed unless perhaps in cases where it could be said that the thing ordered was actually and urgently required; or, as expressed by Lord Justice Bramwell in a recent case, *Hunt v. Wimbledon*, 4 C. P. D. 53: "For work which if the corporation had not ordered they would not have done their duty, or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence;" and proceeding then to point out that that seemed to be the state of things in those cases which have decided that the plaintiffs may recover when the work has been done.

There is an obvious distinction between a municipal and a trading corporation. Even the former can without the formality of a seal transact matters of minor importance and of daily occurrence, but in the case of trading corporations, established for the very purpose of carrying on a

particular business, it becomes a matter of necessity that all such contracts as are of ordinary occurrence in that trade should be binding on the corporation without the formality of a seal, and that the seal should be required only in matters of unusual and extraordinary character which are not likely to arise in the ordinary course of business.

This distinction is pointed out in the judgment of the Common Pleas, subsequently affirmed in the Exchequer Chamber, of *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 473.

It was urged by the plaintiffs' counsel that if the rule laid down in *Hunt v. Wimbledon* be correct, *Pim v. The Municipal Council of Ontario*, and the long line of cases following upon it have been wrongly decided. It is not necessary in this case to express any opinion upon that point, but there is no question that some of the cases referred to in *Pim v. Ontario* have lost much of their weight as authorities since the delivery of that judgment by the Lords Justices of Appeal; and I may add that in *Pim v. Ontario*, 6 C. P. 304, one of the learned Judges is careful to guard against an improper use of that decision, by stating in his judgment p. 311, that "The defendants," a provisional municipal council, "were incorporated for the *express purpose* of erecting a gaol and court house, and were declared to have all corporate powers necessary for the purpose of carrying into effect the object of their erection and \* \* *none other*;" nothing being said as to their having a corporate seal; thus bringing the case within the principle enunciated in *South of Ireland Colliery Co. v. Waddle*.

In the present case it is impossible to say that there has been such a beneficial use of the engine, (or in fact any use of it,) as to bring the case within the exception.

The only time when it was used was for the purpose of the tests, upon the result of which depended whether the defendants would accept or reject it. Five days after the test and acceptance they passed a resolution rescinding that acceptance in consequence of the failure of the by-law

There seems, therefore, to be no pretence for making the defendants liable upon the ground that they have enjoyed the benefit of the article ordered, even if such rule exists in the case of a municipal corporation either in law or equity, as to which the three Lords Justices, Bramwell, Brett, and Cotton, in the case referred to, express grave doubts.

The Municipal Act points out that 'all contracts of this nature shall be by by-law, and if this form had been adopted it would in all probability have provided, as was no doubt perfectly understood by all parties, that its becoming operative would depend upon the result of the voting upon the by-law then before the electors.

One cannot shut one's eyes to the gross injustice of which these defendants have been guilty in declining to refund to the plaintiffs even the sums they have expended for freight and duties. But we sit here not for enforcing morality, but to administer the law as we find it, and with every desire to assist the plaintiffs we are, I think, compelled to affirm the decision of the Court below, and with the usual result as to costs.

SPRAGGE, C. J. O., and PATTERSON, J. A., concurred. ARMOUR, J., was absent when judgment was given.

*Appeal dismissed, with costs.*

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## ANDERSON V. BELL.

*Will, construction of—Period for payment of shares of estate—Per capita or per stirpes—Liability to refund.*

The testator bequeathed his residuary estate, all other property, in lands, mortgages, and stocks, to his grandchildren, "the children of J. C., and of my daughter, A. J. B., wife of D. B., share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming to the age of twenty-five years. Provided, nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than half what their share will be on the youngest coming of age." (Then directions were given as to keeping books of account, and managing the estate.) "And when the books so audited shew the revenue of my estate, after paying the before mentioned bequests, taxes and other charges on the same, amounts to £500, then half of such revenue or income be divided, share and share alike, between the families of my son, J. C., and the family of my daughter, A. J. B." (The other half going into the estate.)

*Held*, affirming the judgment of the Court below, that the children referred to, the grandchildren of the testator, took *per capita*, and not *per stirpes*.

*Held*, also, that although the sums overpaid to some of the legatees had been so paid with the sanction of the Court, but in a suit in which infants' now claiming were not properly represented, that did not relieve the parties to whom such payments were made from refunding the amount, but under the circumstances the order for repayment should arrange the mode thereof so as to be as little burdensome as should appear to be consistent with justice to the parties entitled to receive the money.

THIS was an appeal from the decree of the Court of Chancery drawn up in pursuance of the judgment reported 29 Gr. 452 ; and which declared :

"That according to the true construction of the will of the testator, Robert Cathcart, after payment of the bequests mentioned in his said will, taxes and other charges, the grandchildren of the testator, namely, the children of James Cathcart and Ann Jane Bell, are entitled in equal shares to the revenue and capital of the residuary estate of the testator *per capita* and not *per stirpes* ; that the defendant Mary Bell is entitled to share in the said estate equally with and in the same manner as the other grandchildren of the testator ; that the said grandchildren are not entitled to call on the said plaintiffs for settlement of their several shares in said estate until they shall have respectively attained twenty-five years of age, and that their interests in the said shares are contingent upon their respectively attaining the said age of twenty-five years : and That the plaintiffs are at liberty to charge the shares in said estate of those grandchildren who have already been overpaid with the excess of such overpayments.

The appeal came on to be argued before this Court on the 31st day of January, 1882.\*

*Robinson* Q.C., and *Proctor*, for the appellants.

Upon the true construction of this will, the revenue or income therein directed to be divided between the families of the testator's son and daughter is divisible *per stirpes*, and the judgment of the learned Chancellor on that point in the case of *Bell v. Cathcart*, delivered in 1870, was correct. It is apparent on the face of the will that the testator intended that his estate, capital as well as income, should be divided in such a manner that one-half should go to the children of his son, and the other half thereof to the children of his daughter; and the Court below should have so construed that instrument. Under any circumstances, and whatever may be the view this Court will now take of the question, the decree in the case of *Bell v. Cathcart* having been made ten years before any steps were taken to impeach it, is binding and conclusive on the defendants Bell.

But even if this Court should now hold that future payments are not to be made under and in accordance with the terms of that decree the Court below erred in declaring that the shares of the appellants were liable to be charged with the over payments, such payments having been made under the sanction of and in accordance with that decree, in a suit in which the children of Ann Jane Bell were amply represented by the plaintiff, their father and guardian, and by their mother, who was also a party to that suit, and were so made to the guardian of the appellants, who under such decree was not liable to account therefor nor for payments made to their father by the trustees prior to that decree.

*J. Hoskin*, Q.C., *Moss*, Q.C., and *Jos. McDougall*, for the respondents, the children of Ann Jane Bell, contended that upon the true construction of the will here in question,

\* *Present*, BURTON, PATTERSON, MORRISON, J.J.A., and ARMOUR, J.

the grandchildren of the testator were entitled in equal shares to the whole of the residuary estate, and that the decree made in the suit of *Bell v. Cathcart* was not binding on these respondents they not having been parties thereto; and that whatever sum the appellants had received out of the income of the estate in excess of, what, according to this view they were entitled to, should be charged against their shares of the residuary estate.

*W. Mortimer Clark*, for the respondents Anderson and Whitney, the plaintiffs in the Court below.

*Fissel's Appeal*, 27 Penn. 52; *Bool v. Mix*, 17 Wend. 199; *Lincoln v. Pelham*, 10 Ves. 166; *Walker v. Moore*, 1 Beav. 607; *Heron v. Stokes*, 2 Dr. & War. 89; *Risk's Appeal* 52 Penn. 270, were referred to.

March 27, 1883. BURTON, J. A.—It appears to be now well settled, that in a mixed bequest like that we are considering of realty and personalty, the meaning to be attached to the word "family" is children, unless there are special circumstances, arising either on the will itself or from the situation of the parties, to induce the Court to find another. So far from finding anything in the context in this will to lead to a different conclusion, the disposition made of the *corpus* strengthens the view that the children only were intended; and if that be the construction, it would seem to follow that the division must be *per capita* and not *per stirpes*.

The direction as to division of the *corpus* refers clearly I think, to the grandchildren taking share and share alike, the additional words are merely intended to define with more particularity who the grandchildren are.

The bequest here is very distinguishable from that in *Fissel's Appeal*, 27 Penn. 55, which was referred to on the argument.

The phraseology there employed referring not only separately to the children of each of the brothers and sisters, but placing those bequests on the same footing as that to

a brother of the testatrix, coupled with the expression twice repeated, that the proceeds should be divided equally among her heirs, indicated that the property was to be divided between the classes, and not the individuals named: in other words, that she divided her estate into five equal shares, the number of her brothers and sisters, and gave the surviving brother one share, and to the children in each instance the share that their parents would have taken.

Every case, however, must depend upon its particular circumstances. In the case of *Risk's Appeal*, 52 Penn. 270, also referred to, the Court, whilst recognizing the general proposition, that when a testator designates the objects of his bequests by their relationship to a living ancestor such legatees take equal shares *per capita*; yet, like all other rules of construction, when applied to wills, this also must be controlled by the general intention of the testator.

The direction there was, that the property should remain unsold until the death of the testator's widow, one-third of the income to be paid to her and two-thirds to accumulate till her death, and then the fund to be divided equally between his three beloved children, George, Joseph, and Catherine, the wife of James Risk.

After the death of the widow the real estate was to be divided between his beloved children George and Joseph, and the children of Catherine equally; or, if unable to agree as to the division, the property was to be sold, and the money divided in the same way.

The question was, whether the children of Catherine took shares *per capita* equally with George and Joseph; but it was held that they, as a class, were to be substituted for their mother, and take one of three shares—that is, the class took equally with George and Joseph.

In the present case there is the additional fact, confirmatory of the view that the income as well as the *corpus* is to be divisible *per capita*, that one-half of the income is to be put into the general fund and divided in the manner before directed.

I am, therefore, of opinion that the Court below has placed the proper construction upon this will, in holding that the children of James Cathcart and Ann Jane Bell are entitled in equal shares to the residuary estate, income as well as capital.

I am further of opinion that the children are not bound by the decree in the suit of *Bell v. Cathcart*. It seems to have been assumed previously to James Cathcart's death that the income was payable *per stirpes*, and not *per capita*, and the principal contention would appear to have been into whose hands should the share to the Cathcart family be paid. James, to whom it had been paid, having died. However that may be, I do not think the children, who were not properly represented on that occasion, can be bound, and that they are entitled to be recouped the excess improperly paid over to the Cathcart family.

The question remains as to the fund from which the excess paid to the Cathcart family should be refunded. This is, strictly speaking, a matter which should have been attended to in settling the minutes of the decree, and is not, properly speaking, before us on this appeal, the attention of the Court below never having been drawn to it. But it is proper that some direction should be given for the guidance of the trustees; and it becomes very difficult to deal with it, inasmuch as the payments have been made for so many years with the apparent sanction of the Court, and the materials for our guidance are so meagre.

As between the infants and their trustees, they were entitled to so much money which they have not received. It was withheld from them undoubtedly under an honest misapprehension of their rights, and with the apparent sanction of the Court; but still their position is, that these trustees have diverted it from them. It may be right to order it to be recouped from the shares of the Cathcart children in the remaining estate, but the liability of those shares may possibly depend on circumstances of which we have no knowledge.

To have to repay the money will, under the circum-



stances, be a hardship that will appear all the greater by reason of the apparent sanction of the Court to the payments and the order should arrange the mode of repayment so as to make it as little burdensome as may be consistent with justice to the Bell family.

These matters do not, as I have remarked, appear to have been brought to the attention of the Court below, where they can be so much better dealt with than is possible in this Court.

We, therefore, give leave to the appellants to apply to the Divisional Court, as they may be advised, for further inquiries or directions on this subject *within one month from the first day of April next.*

With this exception, the judgment below is affirmed.

And as to the costs. It would, under all the circumstances, be proper to make a similar direction to that made in the Court below, namely, that the costs of all parties should be paid out of the general estate.

PATTERSON, MORRISON, J.J.A., and ARMOUR, J., concurred.

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## CRATHERN ET AL. V. BELL.

*Guaranty of part of indebtedness—Advance to debtor by guarantor before default.*

The defendant, in order to enable one G. to carry out a contemplated settlement with the plaintiffs—creditors of G.—signed a memorandum guaranteeing the payment by G. of the first two of three promissory notes of \$751 each, “to the extent of \$751.” When the first note to mature fell due G. was unable to meet it, and the defendant, without the knowledge of the plaintiffs or their agents, enabled G. to raise a part of the amount required to retire that note, which amount G. so applied; and this sum the defendant subsequently was compelled to pay. *Held*, [affirming the judgment of the Court below, 46 U. C. R. 365,] no answer to a claim afterwards made upon the defendant to pay the second note on G.’s failing to do so, the advance which had been so made by the defendant to G. forming no part of the sum the defendant was liable for under his guaranty.

THIS was an appeal by the defendant from the judgment of the Queen’s Bench Division, discharging a rule *nisi* to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, reported 46 U. C. R. 365, where and in 45 U. C. R. 473, the facts giving rise to the action are fully set forth.

The appeal came on to be argued on the 26th day of January, 1883.\*

*Bethune*, Q. C., for the appellant, contended that as the defendant’s guaranty was limited to \$751, in respect of both the notes, when the plaintiffs received that sum on account of both the notes, the appellant’s contract was performed; and even if it be construed to mean that the appellant would pay \$751 on account of the two notes he has performed that contract. On the part of the respondents it is said that the appellant should have waited until after default had been made by Glass in payment of the first note, but it is submitted that Glass having been unable to pay, and having informed the appellant of that fact, the appellant was justified in making payment of the amount which Glass was unable to pay; and the amount so paid

\**Present*.—SPRAGGE, C.J.O., BURTON, MORRISON, JJ.A., and PROUDFOOT, J.

by the appellant for Glass should be treated as if the appellant had gone in person to the bank, and made payment of the amount; Glass was appellant's agent for that purpose; and no damage was sustained by the respondents by reason of the appellant omitting to inform them of the payment having been made by him, and it is insisted that the appellant had a right to discharge his obligation by payment whenever it appeared that Glass was unable to retire the note.

*Delamere*, for the respondents, contended that the guaranty was a continuing one in respect of the first two of the notes referred to therein, and the appellant was liable on such guaranty, unless the maker of the notes paid the full amount thereof; and under no circumstances could the appellant be made liable upon his guaranty until default by the maker, but in case of default the appellant was liable to the respondents to the extent of \$751. There was no default in payment of the note. It was paid at maturity by the maker so far as the plaintiffs were aware, and no evidence was given of payment of any part of it by the appellant, nor was there in fact any payment by the appellant; the respondents can not be affected by any agreement or dealing between the appellant and Glass; and so far as the respondents' knowledge extended the first note was paid by Glass at maturity. If the appellant desired to pay any portion of the demand upon his guaranty in satisfaction of it to any extent he should have acquainted the respondents. Payment to Glass or the bank could not be in satisfaction of the guaranty, as neither Glass nor the bank was in any sense the agents of the respondents in respect of such guaranty, which is an independent contract between the appellant and the respondents; the appellant had no right to pay until the contract had become a claim by reason of Glass making default; and the appellant never did pay, nor was he ever called upon by the respondents to pay, until there was default, by Glass. The contention on the part of the respondents is, that the guaranty is one as to each of the two

notes, although the amount is limited in the whole to \$751.

June 29, 1883. BURTON, J. A.—When this case is examined it appears to be a very clear one.

Glass, the principal debtor, applied to the plaintiffs who were his creditors for time, and to this they acceded upon a portion of the debt being secured. Some negotiations as to the nature of the security to be given followed, and resulted in the guaranty in question being given. The point now raised is upon the construction of this instrument. If the words "to the extent of seven hundred and fifty-one dollars" had been omitted it would clearly be a guaranty by the defendant of the payment of the first two notes given by the principal debtor as they respectively matured according to their tenor and effect. The only effect of the introduction of these words is to limit the defendant's liability to the amount specified, in the same way precisely as if the guaranty had contained a proviso to the effect that it was subject to this limitation, "that in no event shall I be called upon to pay under this guaranty more than \$751."

I think it is a fallacy to suppose the defendant had a right to pay any portion of the first note so as to prevent a default, and then claim to apply the sum so paid in reduction of his guaranty. He was no party to the note, and the plaintiffs had nothing to do with him except as a party to the guaranty. If the principal debtor had paid say \$700 on the note, and had allowed it to go to protest for the difference, a right of action would, no doubt, have accrued to the plaintiffs under the guaranty which they might have enforced if they thought proper, but they were not bound to do so, and even if they did it would leave the defendant still liable upon the guaranty to the extent of \$700 in the event of default being made in the second note. Whether he could after such default in the first note have insisted on paying the small balance due upon it in reduction of his liability on the guaranty it is not

necessary to decide ; it is sufficient to say, that by his action in assisting the principal debtor to pay the note to the agents of the plaintiff, whose agency was confined to the collection of the note, he prevented any default, so that the plaintiffs had no cause of action against him until the maturity and default of the second note.

To my mind the question is scarcely arguable. The defendant was to be responsible for the due payment at maturity, not of one but of two notes, the only limit upon that liability being that the damages recoverable are limited to \$751.

I am of opinion that the judgment of the Court below is correct, and should be affirmed, with costs.

SPRAGGE, C. J. O.—The plaintiffs were creditors of James Glass & Co. of Belleville. The last named firm had got into difficulties, and on the 5th of May, 1879, an arrangement was made which was embodied in the instrument upon which this action is brought, and which runs as follows :

“In consideration of Messrs. Crathern & Caverhill of Montreal, accepting the promissory notes of James Glass of Belleville, at four, eight, and twelve months, dated the 28th of April, 1874, for \$751 each, in full satisfaction and discharge of their claims against the late firm of James Glass & Co. of Belleville, I hereby, to the extent of \$751, guaranty the payment of the first two of said notes as they mature according to their tenor and effect respectively.”

This paper was signed by the defendant after, as he says, agreeing with Glass to guarantee payment of his debt to the plaintiff to the extent of \$751, and after refusing to sign a guaranty prepared by Glass, as not being what he the defendant contemplated.

It is a guaranty in sufficiently explicit terms for the payment by Glass to his creditors of the first two of the three notes given by Glass—the extent of the guaranty being limited to \$751, the amount of one note, but still, being a guaranty for the payment of two notes. There may be at first sight an apparent inconsistency in this,

but when we examine the instrument carefully we find that the undertaking to guarantee the payment of two notes imposes obligations upon the guarantor materially different from what would be imposed upon him if guaranteeing only the payment of one note, or the payment of a sum of \$751, though the guaranty for the payment of the two notes be accompanied by a limitation of the amount of liability to the extent of one only; and the rights of the creditors are also materially different.

These are pointed out in the judgment just delivered by my brother Burton. It is a question of construction, and in construing the instrument we must give due effect to every part of it. We should have to discard that part of it in which the guarantor engages to guarantee the payment of *two notes*, while limiting the amount of his liability, if we were to accede to the contention of the learned counsel for the defendant.

In *Ellis v. Emmanuel*, (in Appeal from the Ex. Div. reported in 1 Ex. Div. 157,) cited by Mr. Delamere, Lord Blackburn, after reviewing the cases bearing upon the question of "limited suretyship to secure a floating balance," adds: "But there is no case that I am aware of which lays down that where the suretyship limited in amount is for a debt already ascertained which exceeds that limit, it is *primâ facie* to be construed as a security for part of the debt only and I have failed to see any principle on which such a *primâ facie* construction ought to be adopted. I think in such a case it is a question of construction on which the Court is to say whether the intention is to guarantee the whole debt, with a limitation on the liability of the surety or to guarantee a part of the debt only." The learned Judge concluded by saying that the Lord Chancellor, Lord Cairns, and Mr. Justice Brett concurred in his judgment, and in the reasoning on which it was founded.

In my opinion the case was rightly decided in the Court below.

PATTERSON, J. A., concurred.

PROUDFOOT, J.—I concur in the opinion of the Chief Justice and of my brother Burton.

The guaranty provides that the defendant, to the extent of \$751, guaranteed the payment of two notes of \$751 each as they matured, at four and eight months. On default being made in the payment of the first note, a cause of action would no doubt have accrued to the plaintiffs on the guaranty, but it was optional with them to enforce it. Had they chosen to sue, the defendant on payment of \$751 would have been relieved from all liability. The plaintiffs might have delayed suit till the second note fell due. It at first appeared rather anomalous that a cause of action should exist against the defendant, and that he should have no means of getting rid of it. But it resolves itself simply into a question of what the parties intended, as ascertainable from the language they have used, and after some hesitation I think that the promise to guarantee the payment of the two notes has placed the defendant in that position.

*Appeal dismissed, with costs.*

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## BANK OF OTTAWA V. McLAUGHLIN.

*Jurisdiction of Division Courts—Balance of claim—Judicature Act.*

Where the original demand, no matter how large, is ascertained by the signature of the party liable, and a balance not exceeding \$200 remains due, the Division Courts under the Act of 1830 have jurisdiction. <sup>ains</sup> The Judicature Act and rules in relation to procedure do not apply to the Division Courts; and Rule 330 of the Supreme Court of Judicature applies only to the Courts to which in terms it is made applicable. At the trial the plaintiff elected to take a nonsuit, and the Judge refused a new trial.

*Held*, that plaintiff was entitled to move to set aside the nonsuit, and if refused could appeal therefrom.

*Held*, also, that a promissory note before being negotiated could be stamped by the maker on the day of the making thereof, though after it had been signed and indorsed by the payee.

THIS was an appeal by the plaintiffs from a refusal by the Judge of the first Division Court of the county of Carleton to set aside a nonsuit, and grant a new trial. The cause had been tried by the Judge without a jury.

The appeal came on before Spragge, C. J. O., on the 15th of June, 1883.

*Beck*, for the appellants.

*Aylesworth*, for the respondent.

The facts of the case and the points relied on appear in the judgment.

June 29, 1883. SPRAGGE, C. J. O.—There were several grounds of objection taken by the defendant to the recovery by the plaintiffs, most of which (all I believe except the question as to the affixing of a stamp to the note sued upon) were overruled by the learned Judge. They are now renewed before me upon this appeal.

The first, naturally, in point of order is the question of jurisdiction in the Division Court to entertain the suit.

The action is to recover \$157.03, the balance claimed to be due on a note dated 23rd March, 1876, made by one Roberts, payable to the defendant, three months after date, for \$700.



To give jurisdiction as to amount two things, and two only, are required by the statute. The amount or original amount of the claim must be ascertained by the signature of the defendant, or of the person whose personal representative the defendant is; and it must be a debt or money demand the amount or balance of which does not exceed \$200. The original amount, of which the sum claimed is a balance, is not limited by the Act, and I have no authority to limit it. The two things required concur in this case.

The limitation as to original amount by section 59 of the Division Courts Act, R. S. O. ch. 47, is not in favour of the defendant. Where the cause of action was the balance of an unsettled account, the Legislature thought fit to provide that the original unsettled account must be not exceeding \$400—four times the amount of the limit of jurisdiction. Where the original amount is ascertained by signature, the Legislature has affixed no limit. The inference is, that it was not thought necessary in such a case. The limit here, if in the same ratio as in the case of unsettled accounts, would have been \$800—\$100 more than the amount of the note in this case.

The objection next properly in order is, that the plaintiffs have no *locus standi* after what occurred at the trial. The learned Judge had held that upon the evidence the note appeared not to have been properly stamped, and had given time to the plaintiffs to procure further evidence upon that point. No further evidence was produced. The case was again before the Court on the 9th of May, when counsel for the plaintiffs, Mr. Christie, applied for leave to double stamp the note. The Court held that this could not be done, and the plaintiffs then took a nonsuit, and thereupon and again on the following day applied for a new trial upon the evidence, which was refused.

The language of the note of what passed is, that "Mr. Christie insists on a nonsuit." This word "insist" is the language of the Act, section 81. The Judge may nonsuit for want of satisfactory proof, and the plaintiff may insist on being nonsuited. In the Division Courts Act of 1850

the language is, "that any plaintiff may elect to be nonsuited by the Judge, and insist thereon"—language that might well have been preserved in the Consolidated and Revised Statutes. In this case, after the note that Mr. Christie insists upon a nonsuit is added: "I nonsuit the plaintiffs."

I see nothing in this to disentitle the plaintiffs to an appeal. Their position is, that the evidence was sufficient to entitle the plaintiffs to a verdict, and that they ought to have had a new trial. Counsel moved, as the note says, "on the foregoing evidence."

Where the trial is before a Judge, without a jury, and the Judge gives his views adversely to the plaintiff upon the question of the sufficiency of the evidence, it would seem that the course taken by the plaintiffs in this case was a proper one. His own opinion being that the ruling of the Judge was erroneous, and the Court being the forum to decide both the facts and the law of the case, it is not unreasonable that he should have the opportunity of having the judgment of the Court reviewed, without the penalty of a final determination of the case against him in the event of the Judge being right and himself wrong. That at least, has been the rule, and is so still, unless it is changed by the Judicature Act, rule 330. I think the Judicature Act does not apply. The rule is a rule of procedure applying only to the Courts to which it is in terms made applicable.

I have looked at the cases cited by counsel and at some other cases upon the question of moving to set aside a nonsuit, which a plaintiff has elected to take at the trial. The cases of a plaintiff taking a nonsuit rather than risk his case with the jury have no application to such a case as this. In *Burn v. Blecher*, 14 C. P. 415, it was held that a plaintiff's counsel taking a nonsuit out of deference to the opinion of the Judge is not prevented from moving against it. That shortly was the case here.

There is also a case in Mr. Taylor's Reports, *Cameron v. McLean*, 40, in which the Court granted a new trial, the

plaintiff taking a nonsuit in the belief that he would be at liberty to move to set it aside.

Here no objection was made to the right of the plaintiff to move for a new trial, which of course involved the setting aside of the nonsuit. It was a mode taken, without question, of appealing to this Court upon the point decided by the Judge upon the validity of the affixing of the stamps to the note; and I think that the plaintiffs are entitled to bring the question before this Court for adjudication in the way that they have done.

The question whether, upon the evidence, the note was shewn to be stamped was really, in the shape that it took, a question of law. The production of the note stamped, with the same date on the stamp as on the note, is made by the statute *prima facie* evidence of the stamp being affixed at that date. Taking it to have been proved by the evidence of the defendant that the stamp was not affixed at the time on that day when he indorsed the note, it raises the legal question whether a subsequent affixing of stamps on the same day would not be a good stamping within the Act. This must be so upon the rule that the date is presumed to be the true date; and Mr. Aylesworth therefore argued that the stamps could not be affixed after the indorsement by the defendant, although affixed on the same day, by the maker of the note, before being used by him at the bank.

That was a question of law upon which the plaintiffs' counsel put their case, so far as that part of it was concerned, and the Judge took a view that was adverse to their contention.

Upon the question, of the affixing of a proper stamp on the proper day, by the maker of a note, after, *i. e.*, later in the same day, but after the actual signature by an accommodation indorser, I find no reported case, and I do not find, upon inquiry of Judges who have had much more experience than I have had in such cases, that such affixing of stamps has ever been objected to as invalid. Section 10 of 31 Vict. ch. 9, D. was, at the date of this note, the

section which prescribed the person by whom, and the time when, the stamps should be affixed. From that section, and from subsequent legislation, I take it that the stamps being affixed at the date of the note, the same being also the date of the stamp, was the thing required by the Legislature, and that the fraction of a day was not intended to be taken into account. There was no reason that it should be. The Act was purely a revenue measure, and what was intended was, that the Act should not be evaded by the note being used without being stamped, and that purpose was attained by stamps of the same date as the note being affixed on the same day.

There is, in my opinion, nothing in the objection that the debt is barred by the Statute of Limitations. Robert, the maker of the note, made a mortgage to the defendant to indemnify him against the payment of this and other notes indorsed by him for Robert's accommodation. This mortgage was assigned by the defendant to the Ontario Bank, in order to that bank receiving payments on account of the notes of Robert indorsed by the defendant for his accommodation, and held, some by that bank and some by the Bank of Ottawa, and applying such payments upon such notes in the proportion in which they were held respectively by the two banks. The note in question was held by the Bank of Ottawa, the plaintiffs. The Ontario Bank did receive and did apply such payments accordingly, and thereby the note in question was reduced to the principal sum of \$157.03. Several of these payments were made within six years of action brought. There can be no question that the defendant constituted the Ontario Bank his agent to make these payments.

The defence of payment is not sustained. There was an attempt at compromise by the payment of a smaller sum in satisfaction of the sum due, and some progress was made towards a settlement upon that basis, but it was not carried out to completion.

The defence that time was given by the plaintiffs to Robert without the consent of the defendant, his surety, is not sustained by the evidence.

There is nothing in the objection that the mortgage assigned by the defendant to the Ontario Bank was discharged and another substituted in its place. The evidence is meagre as to how this came to be done. Payments continued to be received and applied as before, as far as appears, with the assent of the banks and of the defendant. Nothing is shewn in this to affect the claim of the plaintiffs. The act was not the act of the plaintiffs, but of the Ontario Bank, the agent of the defendant.

These objections have been urged with great ingenuity by Mr. Aylesworth; but, in my opinion, none of them are entitled to prevail.

I allow the appeal, with costs. The learned Judge should have granted a new trial, or, to deal more directly with the question between the parties, should have held the evidence sufficient to entitle the plaintiffs to a verdict. A verdict may be entered for the plaintiffs.

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## WILTSIE V. WARD.

*Division Courts Act, 1880—Jurisdiction.*

By the Division Courts Act, 1880, these Courts have jurisdiction in actions for a debt, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant.

Where the claim was upon the following document: "Received from R. W. an order from C. B., ordering me to pay him the sum of \$140, which is accepted on the following conditions, providing he carries out his agreement with me as cheese-maker." Signed by the defendant. *Held*, that the Division Court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as it depended upon the happening of certain events with respect to which evidence had to be adduced.

APPEAL by the defendant from the decision of the County Court Judge of Leeds and Grenville sitting in the seventh Division Court.

The appeal came on to be argued before Spragge, C. J. O., on the 22nd of December, 1882.

*George McDonald*, for the appellant.

*Falconbridge*, for the respondent.

The facts of the case and the authorities cited, are mentioned in the judgment.

February 6th, 1883. SPRAGGE, C. J. O.—At the hearing of this appeal I overruled the appeal so far as objections were taken to the ruling of the Judge, upon the defendant's application before him for a new trial.

The question of jurisdiction does not appear to have been raised before him.

The verdict was for \$140, and was recovered upon a paper in the following terms:—

"Elmsley—July 6, 1881. Received from Mr. Richard Wiltsie an order from Chauncey Blanchard, ordering me to pay him the sum of \$140, which is accepted on the following conditions, providing he carries out his agreement with me as cheesemaker,

"RICHARD WARD."

The only evidence that I find of what the agreement was, is an affidavit of the defendant, viz: that he, Blanchard, should run a cheese factory owned by the defendant, for the season, *i. e.*, the season of 1881, at a stated amount, (which amount, as stated in the evidence of Blanchard, was \$250,) and should turn out first-class cheese.

The issue was assumed by the defendant to be, whether or not, as he puts it in his affidavit, Blanchard had so done; the defendant denying that he had so done, and claiming that his loss by Blanchard's default was to as large an amount as the sum that he was to pay Blanchard for the season's work. The reply to this was that Blanchard had turned out cheese of as good a class as the defendant's apparatus for making it, and the milk supply, and the like, enabled him to do. The defendant dismissed Blanchard from his service before the expiration of the season.

It is not denied that the defence made by the defendant was open to him in the Division Court, in a suit brought by the holder of the agreement of 6th July.

From the facts known to the plaintiff it appears that he was aware that the issues in the suit involved the trial of the matters contended for by the respective parties which I have indicated.

The amount in question was beyond the jurisdiction of the Division Court anterior to the Act of 1880, 43 Vict. ch. 8, which Act in a certain class of cases extended the jurisdiction to \$200.

Prior to that there were two classes of cases. The one general, with certain specified exceptions, and in that class the jurisdiction was confined to cases where the amount claimed did not exceed \$40, extended by the Act of 1880 to \$60. The second class was larger in amount, being to the extent of \$100, but at the same time more limited as to the cause of action, being confined to claims for debt, or for money payable under contract for payment in money or in labour, or in goods or commodities. This class was not changed by the Act of 1880.

The Act of 1880, under which this action is brought created a third class; extending the jurisdiction to \$200 but limiting the class of cases to which the extended jurisdiction applied, to "claims for the recovery of a debt or money demand, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom as executor or administrator the defendant represents."

The principle upon which this division into classes is made is plain enough. Where the amount is small it is general, with specified exceptions; and is increased to a larger, and again to a still larger amount, according to the assumed greater simplicity of the matter to be tried. So that when we come to the largest amount of which the Court can take cognizance, it is limited to cases where the amount or original amount is ascertained by signature; the language in this class of cases being the same substantially as that in relation to a class of cases which under the Law Reform Act, 32 Vict. ch. 6, sec. 17, might be tried in County Courts.

They are as described in the Act issues and assessments in the Superior Courts of Common Law, relating to debt, covenant, and contract, "where the amount is liquidated, or ascertained by the signature of the defendant." In *Cushman v. Reid*, 20 C. P. 147, the question was, whether a promissory note made in the United States, and payable in United States currency, was within the Act, and the Court was unanimously of opinion that it was not. Gwynne, J., delivering the judgment of the Court, observing that inasmuch as it appeared that the amount for which the defendant ever was liable was not so many dollars of Canadian money, but such amount in Canadian money as, having regard to the difference between the value of United States treasury notes and Canadian currency, the amount expressed in the note should be worth, which value is constantly varying, an element of uncertainty was introduced which rendered it impossible for the Court to



say that the amount sued for, and for which the defendant was liable, was ever "liquidated or ascertained by the signature of the defendant," and the learned Judge adds: "If so ascertained it must have been when defendant affixed his signature to the instrument." The word "liquidated" is not in that section of the Act upon which this action is brought. Its presence in the Law Reform Act might have raised a question. The Act of 1880 is precise in its language, the amount must be ascertained in one way, viz: by the signature of the defendant.

I agree entirely with the note of the learned Judge of the County Court of the County of Wentworth, *Sinclair's Division Courts Act 1880*, p. 9. Omitting the reference to English cases it runs thus, "It is submitted that the instrument must not be in a conditional form. It may be argued that if the condition were shewn to have been complied with or performed, the action would be maintainable. This can scarcely be considered a fair interpretation of the expressions here used. The amount is to be '*ascertained*' by the signature of the defendant. The fair meaning of these words surely is, that the ascertainment means of some certain and definite sum, and not to be subject to any contingency or condition which may never happen." This is quite in consonance with the construction put upon words not quite so definite in *Cushman v. Reid*, and is in my opinion a sound interpretation of the Act. In *Wallbridge v. Brown*, 18 U. C. R. 158, and *Watson v. Severn*, 6 A. R. 559, the language of the Acts was essentially, different.

To hold such an agreement as that sued upon in this action within the statute upon which the action is brought would be contrary to the manifest policy of that and the previous Division Courts Acts to which I have already referred; as well, as contrary to the plain meaning of the words used. I say plain meaning, because the writing does not ascertain the amount due, or that ever has been due, but only the amount that might thereafter become due in certain events; in relation to which much evidence

*pro.* and *con.* might be given and was in fact given in this case.

My opinion therefore is, that the Division Court had not jurisdiction in this case ; and I must allow the appeal upon that ground, and upon that ground only. And, inasmuch as no objection to the jurisdiction was taken at the trial nor at any time as I believe until after the appeal, I allow the appeal. without costs.

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### MCDONALD V. MCARTHUR.

*Promissory note—Presentment—Protests—No funds.*

In an action upon an overdue promissory note payable at a particular place, it is not necessary to shew that there were not funds at the place named wherewith to retire the bill ; all that is necessary in such case, even as against an indorser, is to shew presentment, non-payment, and notice of dishonour.

THIS was an appeal by the defendant from a judgment of the first Division Court of Stormont, Dundas, and Glengarry.

The plaintiff was the holder of a promissory note indorsed by the defendant, payable at the Merchants' Bank in Montreal, which, on its maturing, had been presented at that Bank for payment, and payment thereof refused, whereupon the bill was protested, and notice of dishonour sent to the defendant. Judgment was given in favour of the plaintiff, and a motion for a new trial was refused.

Under these circumstances the defendant appealed to this Court, contending that the plaintiff had not established his right to recover, not having shewn that there were not funds at the bank with which to pay the note.

The appeal came on to be argued under the statute, before Spragge, C. J. O., on the 31st October, 1882.

*McMichael*, Q. C., for the appellant, in support of his contention, referred to *McQuarrie v. Fargo*, 21 C. P. 478;

*Hedger v. Stevenson*, 2 M. & W. 799; *Jungbluth v. Way*, 1 H. & N. 71; *Emmett v. Tottenham*, 8 Ex. 884; *La Banque Jacques Cartier v. Strachan*, 5 P. R. 159; *Blain v. Oliphant*, 7 U. C. R. 473.

*Falconbridge*, for the respondent.

March 6, 1883. SPRAGGE, C. J. O.—The action in this case was by the indorsee against the indorser of a promissory note payable at the Merchants' Bank, Montreal. The defences were that the defendant did not indorse, and payment.

At the trial the plaintiff proved presentment and non-payment, and protest, and the verdict was given for the plaintiff. The defendant applied for a new trial on various grounds, and his application was refused, and upon the matter coming before me upon appeal I held that the learned Judge was right in refusing the application.

The learned counsel, however, who appeared for the defendant, raised a question which had not been raised before the learned Judge in the Court below, that it was necessary to prove that there were no funds at the Merchants' Bank for the payment of the note, and he referred me to several cases for the establishment of that point in his favour.

Passing over the objection to his raising the question at this stage of the proceedings, it is clear that there is nothing in it. The cases cited are quite beside the point contended for; and I find nothing in favor of it. In the forms of pleading given in the books there is no averment that there were no funds at the bank, or bankers or other place, at which the note is made payable. The books that I have seen, which state what evidence it is necessary for the plaintiff to give in proving his case and the books on the law in relation to bills of exchange or promissory notes, all concur in shewing the law to be that the plaintiff's case is complete upon proving, besides the ordinary proof of signatures, presentment at the particular place, dishonor, consisting in non-payment, protest when necessary, and

notice of the dishonour. I do not find anywhere that it is necessary for the plaintiff to prove that there were no funds for payment. In my opinion the law and practice are against it.

The appeal is dismissed, with costs.

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COCHRANE V. BOUCHER.

*Jurisdiction—Judicature Act, sec. 29, sub-sec. 5—Leave to appeal.*

An action having been tried before a Judge with a jury, the judgment was directed to be entered by the Judge upon the answers to questions put by him to the jury, and the damages were assessed by the jury. The defendants subsequently moved before the three Judges of the Divisional Court to set aside the judgment directed to be entered, but the Divisional Court, when giving judgment upon the motion, consisted of two Judges only, one of them being the Judge at the trial, *Held*, that a Court so constituted had by reason of sec. 29, sub-sec. 5 of the Judicature Act, no power to give judgment, and there being therefore nothing to appeal from, leave to appeal was refused.

THIS case was tried at the Peterborough Assizes, before Wilson, C. J. C. P., and a jury. The learned Judge put certain questions to the jury, leaving it to them to assess the damages, and directed judgment to be entered for the plaintiff for \$275 upon the findings of the jury. At the following sittings of the Divisional Court the defendants moved for and obtained an order *nisi* to set aside the judgment. The motion was argued before the Divisional Court, consisting of three Judges, and judgment was reserved. Subsequently judgment was given by that Court, consisting of the Chief Justice, who had tried the case, and Galt, J., discharging the order *nisi* with costs. See 3 O. R. 462.

The defendants then moved in this Court for leave to appeal from the order issued on that judgment, on the ground, amongst others, that the Court so constituted had by reason of sub-sec. 5, sec. 29 of the Judicature Act, no power to adjudicate upon the motion.

*H. T. Beck*, in support of the application.

*E. A. Peck* contra.

Oct. 6, 1883. SPRAGGE, C. J. O.--This case was tried before the Chief Justice of the Common Pleas and a jury, and a verdict was rendered for \$275 upon the judgment of the Chief Justice.

This judgment was moved against in term before the three Judges of the Common Pleas Division; but two only of the Judges who heard the argument, viz., the Chief Justice and Mr. Justice Galt, gave judgment, the third Judge, Mr. Justice Osler, being engaged in other judicial duty. The judgment given sustained the judgment given by the Chief Justice, so that the judgment of the learned Chief Justice was sustained by the judgment of himself and of one of the other two Judges of the same Court. This is the state of the case as stated by Mr. Beck, and he makes it the ground of an application for leave to appeal.

If Mr. Justice Osler had been absent from the hearing, as he was from the delivery of the judgment, the case would have come literally within the terms of subsection 5 of section 29 of the Judicature Act: "But where the Divisional Court is constituted of two Judges only, such Court shall not hear or adjudicate upon any application against the judgment of either of such Judges."

If a Court so composed is not competent to *hear an application* against such judgment, a Court so composed cannot be competent to *adjudicate* upon such application. To hold otherwise would be to hold an adjudication valid which is plainly within the mischief which the subsection that I have quoted was obviously intended to meet. We are of opinion that the subsection is to be read as prohibiting alike the adjudicating upon and the hearing of any application against the judgment of either of two Judges of a Court so constituted.

Mr. Beck comes to this Court asking for leave to appeal. In our opinion there is nothing to appeal from. If Mr. Beck is accurate in his statement of the case, the two Judges from whose judgment he desires to appeal did not constitute a Court competent to adjudicate upon the application before them. We have nothing before us but Mr.

Beck's statement, and we think that, upon his own shewing, there is no judgment validly pronounced to appeal from. It may be that Mr. Justice Osler did authorize one of the other Judges to give his judgment in the case. If, however, the adjudication has been by the other two Judges only, it must lie upon the party desiring to appeal to obtain a judgment from which he can appeal.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

*Motion refused, without costs.*

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LAPLANTE V. SCAMEN ET AL.

*Vesting order—Conveyance—Title—Payment of purchase money into Court  
—Locus standi.*

One of the defendants in a suit purchased the lands in question upon a sale under the usual decree for partition or sale. The appellant, the plaintiff, was first mortgagee, and the purchaser was second mortgagee of the interest of one S., the owner of an undivided sixth interest in the lands.

*Held*, that the purchaser was entitled to a conveyance from S. with the usual covenants for title as to his interest, and was not bound to accept a vesting order.

CAMERON, J., *dubitante*, whether the question was not one of conveyance rather than one of title, and whether therefore the purchaser should not be ordered to pay his purchase money into Court.

*Quære*, whether the appellant, whose only interest was that of mortgagee of S.'s interest, had any *locus standi* to bring a suit for partition, or to appeal without his co-plaintiff.

THE defendant Arthur Scamen was the owner of an undivided sixth interest in certain lands. The bill was filed by Noah Toussante Laplante, a mortgagee of Arthur Scamen's interest, praying for foreclosure of his interest, or for partition.

On the 5th of November, 1879, a decree was made for partition or sale in the usual form, one B. S. Scamen having been added as a party plaintiff at the hearing, on an objection being taken that Laplante was not entitled to institute the proceedings. The lands were subsequently,

on 26th December, 1880, sold by the Master under this decree to the defendant Thomas R. Adam, by private sale for \$4,010, payable ten per cent. down and the balance in two months. The investigation of title was proceeded with, and on November 24th, 1881, the Master certified that the purchaser's objections to title were disallowed. It appeared that the purchaser had paid his deposit into Court, but refused to pay in the balance, on the ground of delay in perfecting the title, and on the ground that the vendors were unable to furnish a proper conveyance. The plaintiffs thereupon moved before the Master in Chambers for an order that the purchaser should pay the balance of his purchase money into Court.

The Master dismissed the application, with costs. The plaintiffs thereupon appealed from this decision to a Judge in Chambers. The appeal was argued before the Chancellor, who considered that on the materials before the Master he was right, and that therefore the appeal failed; but reserved the final disposal of the matter for a month, and if a proper conveyance were obtained, that the purchase should be carried out, with a reference as to deterioration; costs of appeal to the purchaser. If no conveyance obtained within that time, the purchaser to be set free from his purchase, with costs. Order to be without prejudice to the right of the plaintiff to get costs from the estate.

The plaintiff Laplante thereupon appealed to this Court on the following, amongst other grounds:—

1. That the question of the execution of a conveyance by the defendant Arthur Scamen was not a question of title, and could only be raised on the settlement of the conveyance.

2. That a purchaser under a decree of the Court is bound to accept a vesting order where the parties interested are parties to the suit—at all events when the purchaser is mortgagee of the party whose interest is sought to be so conveyed, the mortgage deed containing full covenants for title.

3. That Arthur Scamen, having only an equitable estate, was not a necessary party to the conveyance, and that under the partition decree his only interest was in the proceeds of the sale, the plaintiff having the legal estate as to Arthur Scamen's share.

4. That the plaintiff could make a good title as to Arthur Scamen's interest under the power of sale contained in his mortgage, and that the purchaser was bound to accept such a conveyance.

5. That the depreciation, if any, was since the date of the report, and should therefore be borne by the purchaser.

The appeal came on to be heard on the 12th day of September, 1882.\*

*H. T. Beck*, for the appellant.

*J. A. Paterson*, for the respondent.

The following authorities were referred to: *Sidebotham v. Barrington*, 3 Beav. 524; *Page v. Adam*, 4 Beav. 269; *Slater v. Fiskien*, 1 Chy. Cham. 1; *Ross v. Steele*, 1 Chy. Cham. 94; *Coffin v. Cooper*, 14 Ves. 205; *Moulton v. Edwards*, 6 Jur. N. S. 305; *Robertson v. Skelton*, 12 Beav. 260; *Ex parte Minor*, 11 Ves. 559; *Twigg v. Fifield*, 13 Ves. 517; *Stephenson v. Bain*, 8 P. R. 166 and 258; *Kincaid v. Kincaid*, 6 P. R. 93; *Rae v. Geddes*, 3 Chy. Cham. 404; *Bull v. Harper*, 6 P. R. 36; *Patterson v. Robb*, 6 P. R. 114.

June 6, 1883. SPRAGGE, C. J. O.—The appeal book shews only imperfectly the facts of the case. The facts are supplemented to some extent by statements of counsel, admitted to be correct by other counsel in the case.

There are two plaintiffs, and their interests are not identical. The appeal is by one of them, Laplante.

The bill was filed originally by Laplante alone. He filed his bill as mortgagee of the defendant Arthur Scamen, who was tenant in common with other defendants of certain land. Arthur's share being one-sixth.

\* *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, J. J. A., and CAMERON, J.



Laplante's bill prayed for payment of his mortgage debt, and in default for a partition or sale of the mortgage premises. He had in fact no *locus standi* to file such a bill, and that difficulty being noticed at the hearing one of the tenants in common, Benjamin Sanderson Scamen, was added as a co-plaintiff, and a decree ordinarily made in suits for partition was made in this case, directing an inquiry whether a partition or sale would be most for the interest of the parties; and the Master reporting in favour of a sale, his report was carried out by private sale, on 26th December, 1880, Thomas R. Adam being the purchaser, at the sum of \$4,010, and paying ten per cent. of the purchase money in pursuance of the conditions of sale. The purchaser Thomas R. Adam was second mortgagee of the interest of Arthur Scamen. The dates of the mortgages by him to Laplante, and to Adam, are not given, nor the amounts.

The order appealed from is dated 30th January, 1882. The judgment of the Chancellor affirms a judgment of the Master in Chambers. The order of the Chancellor gives a month further time for obtaining a conveyance of the interest of Arthur Scamen. Counsel for Laplante had contended before the Master in Chambers, and then before the Chancellor, and contends now, that the purchaser was bound to accept a vesting order; and that is the first and principal point for our decision.

Upon an ordinary contract of sale and purchase it is clear, I think, that the purchaser would not be bound to accept a vesting order in a case where, before the passing of the Act giving legal effect to vesting orders, he would be entitled to a conveyance.

The effect of the Act is simply to vest the title; and where a purchaser is entitled to covenants he gets less by a vesting order than he is entitled to. The usual covenants to which he is entitled are—for good right to convey, for quiet enjoyment, against incumbrances, and for further assurance: *Rawle* on Covenants, 25. Practical inconvenience and loss may result from taking a vesting order

only, as is exemplified in the case of *Kincaid v. Kincaid*, 6 P. R. 93, and the cases there referred to.

Is there then anything in the circumstances of this sale which obliges the purchaser to accept less in the way of title, or of conveyance, than he would be entitled to if he were a purchaser at private sale out of Court?

I infer from the statement of the Master's report of the sale, that what was sold was the land itself—not merely Arthur Scamen's interest as a tenant in common with several others, but the very land itself; and not the interest, equity of redemption, or whatever it might be, of any of the tenants in common. That is the rule in sales under the direction of the Court of Chancery. The advertisement, if there was one, the particulars and conditions of sale, the contract on the sale to Adam are none of them before us. The statement in the appeal book is, that the Master's report found the "lands sold" to Adam. I assume that the sale was as the sale of lands ordinarily is in sales by the Court.

The consequence is, that the incumbrances created by Arthur Scamen are chargeable against his share of the purchase money. That share may leave to him a surplus after payment of the incumbrances, or it may be insufficient for the payment; we are not informed upon that point. However that may be, there is no subsisting equity of redemption in Arthur Scamen, or in any one. Its value is represented by the surplus beyond incumbrances, if there be any surplus; and if there is no surplus, the inference is that it was of no value. The fact may be either way. Whichever way it may be, does it furnish any reason for dispensing with such covenants from Arthur Scamen as a purchaser is ordinarily entitled to? Suppose he were one of two, instead of one of six tenants in common, and the estate a large one, and his share of purchase money largely in excess of the incumbrances upon his share, there would manifestly be good reason for requiring covenants from him. For anything that we see here, there may be good reason for not dispensing with covenants. The question

is not whether such covenants would be of much or little value to this purchaser. If he is entitled to them, we cannot force upon him a mere vesting order.

Mr. Beck's argument as to the position of parties upon the sale is, that the only interest of Arthur Scamen, his equity of redemption, passed to Adam the purchaser by the sale, and that it is still outstanding; and he speaks of Laplante now exercising the power of sale contained in his mortgage, and thereby perfecting the title to Adam. I understand the effect of the sale to be quite different from what Mr. Beck assumes it to be, and I have already explained what I understand it to be. But if he were right upon that point, I do not see that it would better his case. And it admits at any rate of this answer. It assumes that Laplante has been wrong in his position hitherto; and he asks for further time to make title and conveyance upon a sale made in December, 1880. The Chancellor, when the case was before him, upon the same materials, granted one month's further time to Laplante to complete his title; adding, that if a proper conveyance should not be obtained within that time, the purchaser should be set free from his purchase. This extension of time was an indulgence granted to Laplante by the Chancellor, in the exercise of his discretion. We ought not, I think, to review this exercise of discretion; and my own opinion is that we should be wrong to do so in this case.

I have discussed the principal question raised upon this appeal as if the appellant had a *locus standi* to appeal, though I think it doubtful whether he has. In my opinion he does not shew that he has. He does not shew, unless by inference, that he was the vendor. The other plaintiff, the only proper party of these two plaintiffs to file a bill or partition, was the proper party to conduct the sale as vendor. I infer from some of the papers that the sale and subsequent proceedings were in the name of the plaintiffs meaning, I suppose, both plaintiffs; but one only appeals, and that not the one by whom alone the bill should have been filed. It would have been better if Laplante's bill

had been dismissed. He was, I take it, allowed to remain a party to the suit in order to save the necessity of another suit by him to realize his mortgage debt, and in order to his being paid out of the proceeds of the contemplated sale. Taking that to be so, he was not the party to intervene actively in the proceedings in relation to partition or sale. Properly his position was to leave the conduct of the sale to Benjamin S. Scamen, the tenant in common with the defendants, and to intervene only when there was money in Court to be divided. But, looking at the title of the cause in the papers before us, and the heading to the correspondence, I am led to infer that he was allowed, in disregard of his proper position, to have the conduct of the cause after as well as before the decree. The whole thing is an anomaly, and is an instance of the inconvenience resulting from a departure from the settled rules and practice of the Court.

Upon the whole it is perhaps better to dismiss Laplante's appeal, on the ground that he does not shew that the order appealed from is erroneous, than to negative his right to appeal.

In the view that I take of the case, the other questions discussed upon the appeal do not arise.

BURTON and PATTERSON, J.J. A., concurred with the Chief Justice.

CAMERON, J.—I concur, but do so not without some doubt as to whether the contention of Mr. Beck was not right, that the question is rather one of conveyance than of title, and so the defendant, the respondent, should under the circumstances be required to pay the purchase money into Court.

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**THE CANADA CENTRAL RAILWAY COMPANY V. PETER  
MCLAREN.**

*Negligence—Contributory negligence—Evidence—Jury answering questions.*

In an action of negligence for the destruction by fire of a quantity of lumber owned by the plaintiff, and which by leave of the defendants he had piled close to their track, caused, as the plaintiff alleged, by sparks emitted from the smoke stack of one of the locomotives belonging to the defendant company, the jury at the trial found that the fire was caused by the imperfect or defective construction of the smoke stack, the cone being placed too close to the netting, and by reason of the bonnet rim not fitting sufficiently close to the bed. Upon a motion *in banc* to set aside the verdict entered for the plaintiff, the Court, upon the evidence set out in the case (32 C. P. 324), *Held* that the finding of the jury was fully supported thereby, and on appeal to this Court from that decision, the Court being equally divided, the judgment was affirmed, and the appeal dismissed, with costs.

After the occurrence of the accident which caused the destruction of the plaintiff's lumber, B. an engine driver of the defendants, and who was in charge of the locomotive (No. 5) on the day the fire occurred, made an entry in what was termed the repairs-book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight \* \* Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of the plaintiff, and proved his having made such entry in the usual course of his duties.

*Per* SPRAGGE, C. J. O., and HAGARTY, C. J., such entry was properly produced and read to the jury.

*Per* BURTON and PATTERSON, JJ.A., such entry or report was merely a narrative of a past occurrence, or something in the opinion of B. requiring attention, and in any view could only be receivable as evidence against the company, if at all, upon proof of B.'s death. With a view of shewing that engine No. 5 was defectively constructed, evidence was given that on previous occasions when it was in the same or an improved condition, it had thrown out sparks causing fires:

*Per* SPRAGGE, C. J. O., and HAGARTY, C. J., such evidence was properly receivable.

*Semble—Per* SPRAGGE, C. J. O., and PATTERSON, J. A., although a party to a cause may be entitled to call for the production of documents, in order to obtain discovery, it does not follow that the contents of such documents are in themselves evidence.

The new system of calling upon juries to reply to specific question considered and discussed, and, *Per* HAGARTY, C. J., questioned.

THIS was an appeal by the defendants from the judgment of the Common Pleas discharging a rule *nisi* to set aside the verdict entered for the plaintiff, reported 32 C. P. 324, where and in the present judgments the facts giving rise to the action, the pleadings, and the evidence are so fully set forth as to render unnecessary any further statement of them here.

The case came on to be heard before this Court on the 29th and 30th days of January, 1883.\*

*Bethune, Q. C., and W. H. Walker* for the appellants. Although every one who it may reasonably be supposed could give any evidence in relation to the accident, which has resulted so disastrously for the plaintiff, has been examined as a witness, the testimony adduced, in view of the findings of the jury, has failed to establish any such liability on the part of the defendants as would warrant a recovery by the plaintiff against them : in fact no evidence has been given to shew that the fire that ignited the lumber of the plaintiff was emitted from the locomotive of the plaintiffs ; the most that can be said in this connection is, that the evidence raises a suspicion that such may have been the fact, but it is only a suspicion. Admitting, however, that the evidence does reasonably shew that the fire which ignited the lumber did come from the locomotive of the defendants, it fails utterly to shew that the sparks were so emitted by reason of any structural defects in the engine, and the jury have expressly negatived any mismanagement on the part of the appellants or their servants. The evidence establishes that every locomotive, while in use on a railway, will emit fire sufficient to ignite combustible matter, no matter what precautions to prevent such casualties may be adopted by the persons using the engines. And here it must be borne in mind that there is a total lack of evidence tending in any degree to shew that if the fire which ignited the lumber of the plaintiff did come from the locomotive in question, the same would not have occurred even if the structural defects mentioned in the findings of the jury had been entirely absent, and the cone of the engine had been placed at what it is alleged would have been a proper distance from the netting. Here the plaintiff, in fact, assumed the responsibility of placing his lumber so close to the track of the defendants' railway as he did ; thus by his own act contributing to the injury, if it really did arise from the fire discharged by the loco-

\**Present*—SPRAGGE, C.J.O., HAGARTY, C.J., BURTON and PATTERSON, J.J.A

tive ; and the findings of the jury are clearly only based on conjecture, and are too uncertain to ground a judgment in favour of the plaintiff. Judgment, it is submitted, should have been given in favour of the defendants, or at the least a new trial should have been ordered. A new trial, we submit, ought to be directed on the ground that the learned Judge at the trial improperly received evidence of entries in the repairs book kept in the work shops of the defendants, the same having been made after the occurrence of the damage complained of. The learned Judge also received evidence that fires had been occasioned by sparks from the engine in question, on other occasions than the one which gave rise to the damage in the present instance, which would also form a ground for insisting on a new trial.

*McCarthy, Q. C., and Creelman*, for respondent. The finding of the jury was distinct as to the fact that the fire which caused the destruction of the plaintiff's property originated from a spark or sparks emitted from the engine of the defendants, and that such sparks came from the smoke stack of the locomotive, and resulted from imperfections therein. One prominent defect in the structure was the close proximity of the cone to the netting of the smoke stack ; another, that the rim of the bonnet of the smoke stack was not as completely fitted to the bed as it should and might have been, and the appellants might and could, and we contend ought to have prevented the fire occurring. The findings of the jury were such as clearly entitled the plaintiff to a verdict, and the Court will not now disturb the judgment which has been given in favour of the plaintiff ; in effect take the matter out of the hands of the jury, the proper authority for disposing of the questions of fact.

It is true that it has not been established by any one who saw the spark fly from the defendants' locomotive and ignite the plaintiff's lumber, that caused the damage complained of, but that such was the fact, is as well established as under all the circumstances it can be ; and no

evidence has been adduced by the defendants that would reasonably induce any intelligent person to say that some other cause has produced the fire; while, on the other hand, the plaintiff has affirmatively shewn that there was not any other source from which it can reasonably be assumed the fire could have arisen. The lumber was piled on the defendants' own premises, and had been placed there with their approval and consent, they being desirous of having the same in a convenient place for them to place on their cars. This cannot be considered such contributory negligence as would relieve the defendants from the consequences of their negligence in the use of their locomotives, as is found to have been the case by the jury. Here two juries have found in favour of the plaintiff upon the facts, and the Court below having in its discretion refused to disturb the second verdict, this Court will not interfere with such exercise of discretion.

In addition to the cases cited in the Court below: *Blyth v. The Birmingham Water Works Co.*, 11 Ex. 781; *Frankford, &c., Turnpike Co. v. The Philadelphia and Trenton R. W. Co.*, 54 Penn. St. 345, and cases therein cited; *Field on Corporations*, secs. 550, 551, 552, were referred to.

October 6, 1883. SPRAGGE, C. J. O.—Before I had prepared any judgment in this case, I had the advantage, by the kindness of the learned Chief Justice, the President of the High Court, of perusing the judgment which he had prepared. This renders it unnecessary for me to go so fully into the case as I should otherwise have done.

The exhaustive judgment of the learned Chief Justice of the Common Pleas Division shews that it has received at his hands the most anxious investigation, and the questions raised upon the defendants' application *in banc* were argued before the three learned Judges of that Court very fully and very ably; and they have been again so argued before this Court; and I infer from the questions put by jurors from time to time in the course of the



trial, that the case received at the hands of the jury an intelligent and careful consideration. Their findings indicate the same thing, as well where they have found for the plaintiff as where they have found for the defendants; and I quite agree with the learned Chief Justice who sits with us in this case, that we ought not to disturb the verdict upon any ground that may be called the merits of the case.

Were we to do so we should indeed be running counter to a rule which a tribunal that is to us the Court of last resort has laid down for its own guidance. I allude to what was said upon that point in the late case of *The Connecticut Mutual Life Ins. Co. v. Moore*, L. R. 6 App. Cas. at p. 656, Sir Robert Collier, after observing that it had been a question requiring serious consideration, whether their Lordships should exercise the power which they possessed of granting a new trial in the case, proceeded to say: "Undoubtedly the verdict is not altogether satisfactory. If the only question for their Lordships was, whether or not they take the same view of the evidence as the jury, they might be disposed to say that the evidence on the part of the defendants somewhat preponderates. But this is not enough to justify them in granting a new trial; to hold it to be enough would be, in fact, to substitute a Court for the jury. In order to be justified in granting a new trial they must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury, in finding for the other party, have either wilfully disregarded the evidence, or failed to understand and appreciate it."

I take it that their Lordships intended to enunciate what was, in their judgment, the correct principle that should govern all Courts, not the Privy Council only, in granting or refusing new trials, where the ground of the application is that the verdict is against evidence, or against the weight of evidence. In my opinion, there is very much less reason for ordering a new trial in this case, upon either of these grounds, than there was in the case before the Privy Council.

The learned Chief Justice of the Queen's Bench Division has, besides dealing with the question that I have just been considering, dealt also with the objections to the verdict on the score of the improper admission of some evidence, and the improper rejection of other evidence. The point most strongly urged is, as put in the reasons of appeal, the reception of "evidence of entries in the repairs-book kept in the defendants' shop, made after the time of the occurrence complained of in the declaration."

The book in which these entries were made was an official book, provided and kept by the defendants for the purpose of such entries being made therein; and Edward Burns, the engine-driver of the engine in question, on the occasion in question, was the proper person to make the entries under the circumstances; and it was he that did make them.

The cases referred to by the learned Chief Justice upon this point, turn upon the question, whether the documents referred to in those cases were subject to inspection under the English Common Law Procedure Act of 1854, or were privileged from inspection. The direct question was not what use could be made of them beyond an inspection of them, or how far they would be evidence against the party who was directed to produce them; though the latter question also was referred to incidentally in some of the cases.

Thus in *Mahony v. The National Widows' Life Assurance Fund*, L. R. 6 C. P. 252, it was obvious that the document, production of which was sought by the plaintiff, might be evidence against the defendants. The action was upon a policy of life assurance. The defence was, that the policy was obtained through fraudulent concealment and misrepresentation. The papers, production of which was asked for, were, *first*, the report to the company of their medical officer; and as to that there was no serious question; *second*, reports made to the company by private friends of the assured, which it was contended were privileged; but the objection was over-ruled. If these reports or any of them conveyed information to the

company of facts which they by their plea alleged to be concealed or misrepresented, they would themselves be evidence; not indeed evidence of the existence of the facts stated in them, but evidence that the company was not misled, and so negative their defence. In that way, and for that reason, secondary evidence of their contents would, as suggested by Sir Montague Smith, be admissible at the trial.

In *Skinner v. The Great Northern R. W. Co.*, L. R. 9 Ex. 298, the action was by a passenger who had received personal injury through, as he alleged, the negligence of the defendant company; and the document of which production was sought was the report of the medical officer of the company. It was ordered to be produced. Nothing was said as to the use that could be made of it, nor was that necessary. But it is not very apparent that the report could be of any particular value to the plaintiff unless its contents were evidence for the plaintiff, and that they would not be, unless as against the defendants they were taken to be true. The observation of Mr. Bethune, that the person making the report, though an official of the company, was not the agent of the company to make admissions, would have been as apposite to that case as to this. In each of the two cases he was an official of the company, his duty being to state facts for the information of the company; and the opposite party was entitled to know (save in some excepted cases) what facts were stated in the report made.

It does not follow, and, as was said by Blackburn J., in *Fenner v. The London and South-Eastern R. W. Co.*, L. R. 7 Q. B. at 769: "It is not necessary that the documents should be in themselves evidence" to entitle the opposite party to their production. And the converse of this is probably true, that it does not follow, from a party being entitled to the production of documents in his adversary's possession, that the contents of these documents are in themselves evidence.

It is not necessary, however, in this case to determine

that point. There can be no doubt, I think, that the report of Burns was a document to the production of which the plaintiff was entitled. The document was in Court, Burns himself was examined as a witness, and the plaintiff was clearly entitled, I think, to use the document in the examination of the witness. It is apparent from reading his evidence, the questions put to him, and his answers, that he was not only an unwilling witness, but an evasive, equivocating witness. The jury heard him, and saw him, and they had evidence of what was done upon the engine before and after this report. They had before them also the evidence of Sharkey, and from all this they drew their conclusions. If this report of Burns had been simply put in as evidence *per se* against the defendants of what is stated in it, it would be a very different question from that which is presented to us. As it was used upon the examination of Burns, a perfectly legitimate use was made of it, and in its so being used there was, in my judgment, no improper admission of evidence.

I think, further, that evidence was properly admitted, of this same engine having thrown out sparks on other occasions, from the same part of the smoke-stack as it is charged that sparks were thrown out from upon the occasion in question; it being proved that the engine was in the same condition, or in an improved condition, on the other occasions referred to.

It is part of the plaintiff's case that the engine was so insufficiently and improperly constructed, that sparks from the fire and portions of burning matter escaped, and flew upon the lumber in question, and set the same on fire. The faulty construction of the engine in this respect was thus put in issue, and the evidence offered and admitted was relevant to that issue.

An American case, *Baltimore and Susquehanna R.W. Co. v. Woodruff*, 4 Maryland, R. 242, is cited to us by the defendants. The issue, upon which the evidence was offered in that case, was whether the defendants so carelessly and negligently drove their engine, that thereby

sparks and fire from their engine were blown and cast upon the plaintiff's fences, &c. The issue was simply negligence upon the one occasion complained of in the declaration. The issue upon which this evidence is offered in the case before us was different, and it was upon that issue that the jury found for the plaintiff.

It strikes me, too, that the action for injuries received from animals of a ferocious disposition furnishes an analogy to the case before us, upon the question of receiving this evidence. Take, as the most familiar instance, that of a dog, "used to bite mankind." His habit of biting is proved by instances in which he has bitten. This evidence proves the fault in the disposition of the animal. If he has bitten once, or oftener, he may do so again, and proof that he has done so once is sufficient: *Charlwood v. Greig*, 3 C. & K. 46. *Fleming v. Orr*, 2 MacQ. 14, may also be referred to.

The analogy is this: in the one case the fault is in the construction of an engine; in the other case the fault is in the disposition of a domestic animal. In each case the fault is evidenced, not only by the one act which is in question, but by another or other acts; and these other acts are relevant to prove the fault. In my opinion the evidence was admissible.

I do not know that I can usefully add anything to the judgment of the learned Chief Justice upon the reception of other evidence, or again upon the rejection of other evidence. I agree with him upon these points.

In the judgment which he has prepared, the Chief Justice has commented upon the practice of putting a number of questions to be answered by the jury.

I have not had nearly so large an experience of the practical results of this course as the learned Chief Justice; and prefer not to express any decided opinion upon it. My impression, however, would be that putting questions carefully framed would convey to the mind of the jury the different questions of fact upon which they were to pass, more definitely than would a charge without questions. No doubt these questions should, as far as reasonably may

be, be few and simple; and the observations of the Chief Justice pointing out some inconveniences in the working of the system are entitled to the greatest respect.

I agree that the omission of the jury to answer some of the questions put is not necessarily a ground for impeaching a verdict.

The Judge who tries a case can exercise a wise discretion as to the questions put, and as to requiring, or dispensing with findings by the jury upon certain of them.

I agree with the Chief Justice, that in this case the answers actually given are sufficient to warrant the verdict for the plaintiff.

HAGARTY, C. J.—This case has been twice tried before special juries. Each time a verdict has been rendered for the plaintiff, for the same amount. Each trial lasted many days, and a very large amount of evidence was taken, and there has been the most minute and industrious examination and analysis of the evidence, such as might be expected from the eminent counsel who appeared for the parties.

The verdict on the last trial has been upheld by the Court of Common Pleas, after elaborate argument, and very full consideration.

That Court had the fullest opportunities of thoroughly understanding all the facts, as the last trial was before one of their own Judges, Mr. Justice Osler.

A very full examination of the evidence leads me to the conclusion, that the Court below was right, in refusing to disturb the second verdict, on the merits, and that it is impossible for us to interfere on that ground.

I adopt the views expressed in their judgments, as to the effect of the findings of the jury in answer to the questions.

The remarks of the Chief Justice (at pages 403-4 of the Appeal Book) (a) in analyzing the questions and answers are, in the main, satisfactory to my mind, and it is not necessary that I should repeat them.

The jury find, in effect, that the fire occurred from sparks cast by the locomotive: that such sparks came from the smoke-stack: that it was from imperfections in the stack: that the cone was too close to the netting: that the bonnet was not fitted to the bed so completely as it should have been: that although there was more substantial danger of fire from a bonnet provided with the mesh the defendants used, than from that used by the Northern Railway Company, the smallest in use, the defendants were not negligent in using their mesh.

They also negatived, in substance, the existence of contributory negligence; and they found that defendants could have prevented the fire, and that the plaintiff was entitled to a verdict.

Questions relating to the management of the smoke-stack and ash-pan, and as to the fire having been caused by the ash-pan, were not answered.

I am of opinion that the facts found by the jury are sufficient to warrant their verdict for plaintiff; and their omission to answer certain of the questions cannot affect the general finding.

It is, doubtless, of great advantage for the ultimate decision of a cause, that, instead of a general verdict, either for plaintiff or defendant, the jury should find specifically certain matters submitted to them by the Court.

But during the last few years it has been made painfully apparent to me, sitting in a Divisional Court, that the practice is not without serious disadvantages.

We are becoming accustomed to hear the most minute verbal criticism, as well on the form of the question as on that of the reply—that the language of the question does not come up to the standard of pleading, or is open to a special demurrer—that the failure of the jury to answer one or more questions, which the counsel may have pressed the Judge to put, or the possible inconsistency between one answer and another. All these objections are adding much to the difficulties we have in dealing with verdicts.

As a general rule, I deem it wise to reduce the number

of questions to the smallest reasonable number, and I know that, as a general rule, the greater the number, the larger opportunity is afforded for materials to found objections to the verdict.

In the case before us, I think the answers actually given are sufficient to warrant the verdict for the plaintiff.

As to the general merits of that verdict, I think that, if it had been for the defendants, we could not properly disturb it; that it was pre-eminently a jury question; and that evidence was before the jurors sufficient to have supported a finding either way.

It remains to consider the legal objections raised. They refer almost, if not wholly, to the reception and rejection of evidence.

The first, I find, is as to the evidence of John Flett.

Engine No. 5, was that from which the fire was charged to have come, and an immense mass of evidence was given, as to the ash-pan, smoke-stack, cone, bonnet, wire-mesh, &c., &c., and whether it was properly constructed to prevent the emission of sparks.

The fire took place about mid-day—27th May. Flett said he had seen this engine pass the lumber yard, before this day, for three or four months. That he did not think very favourably of it, because he had several times seen fire drop from it, from the ash-pan, on to the road.

Mr. Bethune objected to evidence being given as to fire dropping on former occasions.

The learned Judge held it receivable, for the purpose of shewing that it passed fire from defective construction. He refused to let the plaintiff's counsel ask, as to any particular occasion; that would come from the other side, if they desired it.

I cannot say there was any reception of improper evidence here; and even if technically inadmissible the evidence is immaterial, as the plaintiff's case in no way suggested that this fire came from the ground, and the jury expressly found it came from the smoke-stack.

I think the law would be in a very unsatisfactory state,



if, in an inquiry whether fire came from this engine, witnesses should be debarred from stating that, as it passed and repassed this lumber yard, both before and after this accident, fire had been seen coming, either from the smoke-stack or ash-pan.

It must be borne in mind what the contest really was.

Not that fire was seen to come from her, and to ignite the lumber, on this 27th May, but whether, from a long chain of circumstances and evidence, bearing on its construction and appliances generally, fire could or could not be reasonably found to have escaped, and caused the damage.

The plaintiff seeks to draw a conclusion of fact—that the fire must have come from it.

The defendants insist that it was so constructed and managed as to render such a conclusion untenable.

I repeat that it seems to me wholly unreasonable to exclude proof, that, prior to this day, it had been seen doing the very thing which the jury are asked to find that it did on this occasion.

The fullest opportunity would be, and was, afforded to the defendants to shew any different condition in which it might have been on former or other occasions. If no such difference existed, then the evidence would seem much in point.

If defendants' argument be sound, it would be necessary to reject the most direct evidence, that fire was seen to be constantly emitted from the smoke-stack, or ash-pan, as it passed along, a mile or two before reaching the point in the yard where the flames were first seen that day.

It was also objected, that a witness, Nevins, said that on a day before this accident, in that spring, his shirt was burned by a spark of fire coming from this engine.

This was said by the witness before objection, and as Mr. Bethune said, to the witness, he said this of his own motion, without Mr. McCarthy asking him. The objections to this evidence seem to have been sustained. It is very unimportant.

Objection is taken to the evidence of Mr. Vernon Smith. It is, almost wholly as to matters of scientific or mechanical opinion, and a large portion of it was given before any objection was raised. It was given after the evidence of Burns, Sharkey, and others, as to what had been done in the workshops to the bonnet and smoke-stack, and his opinion asked as to the propriety and effect of the alterations, and the effect of the crushing the bonnet had received as declared by the previous witnesses.

I do not think this objection, as taken, should prevail.

The objection most strongly urged before us was, as to the reception in evidence of a report as to the state of this engine, made by the engine-driver, E. Burns.

It was found that it was part of the regular duty of engine drivers to make such reports to the office.

Burns drove the engine on the 27th May, when the fire occurred. He was called by the plaintiff, and proved that he did not hear of the fire until he reached Arnprior; that afterwards he went to Sand Point; next day he returned with the engine to Brockville, arriving late at night. On 29th May, he took her North to Sand Point. He made a report on the 30th May, to the office at Brockville. This will be found in the appeal book at page 371, (Ex. 11), to the effect, amongst other things, "Bottom rim of bonnet in stack wants making tight," and "Screen wanted in front of ash-pan." On the 29th he noticed that some fire-clay had been put round the rim. On the 30th May, he said he saw a stick of punky wood on fire in the tender to this engine. Could not say where it came from.

The witness admitted having made this report, and identified it when produced.

He was examined, and cross-examined at length, as to all the circumstances under which he made it, and why he made it, and as to its accuracy, &c., &c. The learned Judge admitted it, and the statement as to seeing the bit of wood on fire on the 30th.

I am of opinion that he was right in so doing.

When a charge like this is made against a company, as

in every similar case, the best evidence ought, of course, to be produced.

The plaintiff ascertains that it is customary for the engineer in charge to report on the state of his engine. Before the trial he requires the defendants to produce such report for his inspection, and of course it would be produced.

He calls the engineer, or other official, making such report, and asks him did he so report, and requires it to be produced; and, on production, asks him if he made such report. If he admit he did so, I feel no doubt whatever but that it can be read to the jury. It is, of course, subject to any explanation which he may make, and the defendants can fully contest its correctness, or shew that he was mistaken, &c.

In this case the witness fully admitted having made such report.

It is a wholly different question, as to how far his employers would be bound by any admissions or statements made by him to the like effect as the contents of his report; or whether the report could be given in evidence, without proving it by calling him. I do not propose to enter into any discussion on these points.

Here the report was proved and admitted by the man who made it, and it is, therefore, taken out of the region of admissions.

I think it is immaterial by whom he was called. If for the defence, he could, unquestionably, be asked, did he not so report; and, after due notice, he could be asked as to the contents of his report, without producing it.

When called by the plaintiff, I consider it can be equally called for and used as evidence. I refer to a few cases—*Mahony v. The National Widows' Life Assurance Fund*, L. R., 6 C. P. 252; *Skinner v. Great Northern R. W. Co.*, L. R. 9 Ex. 298; *Baker et al. v. L. & S. W. R. W. Co.*, L. R. 3 Q. B. 91; *London Gaslight Co. v. Chelsea*, 6 C. B. N. S., 411; *Woolley v. Pole*, 14 C. B. N. S., 538; *Woolley v. North London R. W. Co.*, L. R. 4 C. P. 602; *Daniel v. Bond*, 9 C. B. N. S. 716.

These are all cases as to the production of such documents. As Blackburn, J., says, in *Fenner v. London and South Eastern R. W. Co.*, L. R. 7 Q. B. at p. 769: "It is not necessary (for production) that the documents should be in themselves evidence;" and Keating, J., in *Woolley v. N. London R. W. Co.*, says to the same effect, adding, that if it be quite clear that a document cannot be given in evidence, it may, perhaps, be a ground for refusing inspection.

Montague Smith, J., in *Mahony v. The National Widows' Life Assurance Fund*, when joining in ordering production, by defendants of a report made to them by their medical adviser, on a proposed insurance, speaks of it (at p. 257) as being such a document, as to the contents of which, on failure to produce, plaintiff could give secondary evidence.

Erle, C. J., in *Daniel v. Bond*, in ordering production of a surveyor's report as to a survey of a vessel's condition, made when she was abroad, with many other documents, in an action for damage to goods by unseaworthiness, says, (at p. 723): "If these are not strictly evidence, they are at all events proximately connected with the issue to be tried, and ought to be admissible in evidence. If the ship were surveyed, and repairs done to her in pursuance of the recommendation contained in the survey, and the owner paid the shipwright's bill, that would go far to fix him with knowledge that the ship was in such a state as to require the repairs mentioned in the survey."

The report here stands on the same footing as the report of a master of a ship to his owners, on his return to port.

We are not required to discuss what weight should be attached to it, we have only to determine that it is admissible when, as here, it was proved by the person who made it.

It was objected that it was too late, being made on the 30th May, when the damage was done on the 27th. Its value depended on the evidence of the man who made it according as he made it applicable to the state of the

engine on the 27th. That would be a question of degree, not of mere admissibility.

I think its rejection would have been a grave error. Then, as to what Burns reported in August, as to the engine. I think this was rightly admitted, accompanied, or prefaced, by his statements as to the state in which the engine remained in his charge from the accident up to the time in August.

As to the alleged rejection of evidence, tendered by defendants, of an examination by experts, in October, the learned Judge, as I understand, expressed his willingness to admit it, provided evidence was given as to the state of the engine being the same at that examination as on 27th May, or as to any permanent structural feature of the engine. This evidence the defendants did not pretend that they could give. I think we cannot hold that there was any failure here.

In fact, every species of evidence was given on each side, of experts and others, bearing on every conceivable point, as to the construction of the locomotive, and the size of the wire-mesh, the position of the cone, the kind of bonnet used, and the way it was fitted on the rim.

It would be difficult, indeed, after such a searching and protracted inquiry, to imagine that either party could have substantially suffered by the rejection of any evidence, legal in any possible view.

It is noteworthy, that in the elaborate judgment in the Court below no notice whatever is taken of these objections to the admission or rejection of evidence.

When judgment was delivered, the Court was not reminded of the apparent absence of decision on these objections. This is unfortunate, as we might have then had the views of the learned Judges on these points, so warmly urged before us.

They evidently failed to make any serious impression on the mind of the Court.

On the whole, I think the appeal must be dismissed, with costs.

BURTON, J. A.—This case, which is an action against the defendant company for negligence in the careless and unskilful management of their engines, and on the ground also that the engines were improperly constructed, so that sparks and portions of the burning matter escaped from the engine and set fire to the plaintiff's lumber stored in his lumber yard, through which the engines were driven, has been twice submitted to a jury, resulting on each occasion in a verdict for plaintiff for \$100,000.

A rule *nisi* was obtained at the Hilary Sittings to set aside the last verdict, and enter judgment for the defendants, on the grounds: (1) That it is not found as a fact that the fire came from the defendants' locomotive, but is at most only a matter of conjecture; or why the said findings in answer to the 1st, 5th, and 10th questions should not be set aside, and a judgment entered for the defendants on the ground; (2) that there was no evidence to go to the jury in support of the plaintiff's declaration or statement of claim; and there was not sufficient evidence that the fire, which ignited the plaintiff's lumber, came from the defendants' locomotive; (3) and on the further ground that there was no evidence of negligence on the part of the defendants, either in construction or management of their locomotive; (4) and on the further ground that the plaintiff, by piling his lumber on the defendants' property, so close to the defendants' track, took upon himself the risk of the same being consumed by fire from such locomotives as the defendants used; (5) or why the finding of the jury in answer to the said 1st, 5th, or 10th questions, should not be set aside; or (6) why the findings of the jury in answer to the 1st, 2nd, 3rd, 4th, 5th, and 10th questions submitted to the jury should not be set aside, on the ground that these findings are against the evidence; (7) and on the ground that they are not sustained by the evidence; (8) and why the findings of the jury in answer to the question, "Was the bonnet rim fitted to the bed?" which finding was as follows: "We think not so completely as it should have been," should not be set aside, on

the ground that the question ought not to have been submitted to them after the other findings of the jury had been rendered, and after a motion had been made for judgment; (9) and on the ground that the said finding is against the evidence, and is not sustained by evidence; (10) and why a new trial should not be had, on the ground of the improper reception of evidence of entries in the defendants' repairs-book, both in May and August, made subsequent to the fire; (11) and on the ground that evidence was admitted to prove fires, said to have come from the defendants' engines, on other occasions than that in question; (12) and on the ground of the improper rejection of evidence of experts who had examined the smoke-stack in question in October, after the fire.

This rule was subsequently discharged, and this appeal is against that decision.

We have, therefore, to consider whether upon the whole case there was any or sufficient evidence of negligence to warrant a recovery; or, assuming that there is some evidence, whether, on these findings, a judgment could properly be entered for the plaintiff; whether the plaintiff did not take upon himself the risk incident to the close proximity of the lumber to the track, and so to have contributed to the injury; or whether a new trial should not be had on some of the above grounds, or because some of the findings are not sustained by the evidence, or on the ground of the improper admission or rejection of evidence.

The learned counsel for the plaintiff contended, but it struck me without having himself much faith in the contention, that it was sufficient for the plaintiff to make out a *prima facie* case of negligence, by giving evidence from which the jury might infer that the sparks from the engine caused the fire, and that it was upon the defendants then to rebut the presumption of negligence by shewing that all reasonable precautions, in the management and in the construction of the engines, had been taken; and he relied, among other cases, upon *Powell v. Fall*, 5 Q. B. D. 599, and the remarks of Lord Bramwell; but that case is

very distinguishable; the defendants there had no statutory protection; they would clearly have been liable at common law, and the statutes, under which they were acting, carefully preserved all remedies for injuries which might be inflicted upon individuals.

Baron Bramwell's hostility to the early decisions of *Rex v. Pease*, 4 B. & C. 30, and *Vaughan v. Taff Vale R. W. Co.*, 5 H. & N. 676, is well known; but whether rightly or wrongly decided, those cases have received the confirmation of the House of Lords, and cannot now be questioned.

I think that ever since the decision of *Vaughan v. The Taff Vale R. W. Co.*, in appeal, the rule has been firmly established that a railway company, authorized by law to use locomotive engines, cannot be held liable for injuries occasioned by sparks escaping from the engine, without proof of negligence. The statutory authority is their warrant, and any loss occasioned by the engine would be *damnum absque injuria*.

I take it to be clear, therefore, that the onus was upon the plaintiff of proving affirmatively some act of negligence on the part of the defendants. He does not do so by shewing that the fire broke out in the lumber shortly after the engine passed, which may raise an inference that it was occasioned by sparks from the engine.

The case of *Gibson v. South-Eastern R. W. Co.*, 1 F. & F. 23, and the cases referred to in the note to that case, were decided before the decision in appeal in *Vaughan v. The Taff Vale R. W. Co.*, and cannot now be considered as good law.

The onus then being upon the plaintiff to shew affirmatively, not only that the fire which caused the injury proceeded from the defendants' engine, but that they were guilty of some mismanagement, or that the construction of the engine was defective, and that the escape of fire was attributable to that defect; if it had been admitted at the trial, as was afterwards found by the jury, that there was no negligence in using the mesh or netting which was



used, and that the fire was not caused by coals or sparks from the ash-pan, I should have been inclined to hold that there was no evidence to go to the jury of its being caused by any defect in the construction of the smoke-stack. When I say that the onus is upon the plaintiff to prove affirmatively the negligence of the defendants, I must not be understood as meaning that that negligence can only be shewn by positive affirmatory evidence, but it is necessary to shew facts from which an inference of negligence can reasonably be drawn. Is there any evidence here from which it can properly be said that such an inference can be reasonably and fairly drawn?

Before proceeding to consider the other evidence, it is necessary to consider whether the evidence of the report of Burns, the engine driver, was properly received.

I have found myself unable, after full consideration, to agree with the learned Judges who have preceded me, as to the admissibility in evidence of that report made some few days after the occurrence, nor, with all respect, which is undoubtedly due to their opinions, can I see upon what principle it is admissible.

If the conduct of the driver in the management of the engine, on the occasion of the accident, had been in question, any declaration made by him at the time and accompanying that act might well be receivable, as reflecting light upon and explaining the act itself. Then it would be receivable as part of the *res gestæ*.

Here, at most, the entry or report of Burns is a mere narration of a past occurrence, or of something in the opinion of the witness requiring attention, and, even assuming for a moment that the evidence was sufficient to shew that the report was made immediately after the occurrence, by a servant of the company, in the usual course of his duty or employment, it would only be receivable in evidence against the company, if at all, upon proof of his decess.

It is of course not admissible as an admission of an agent of the company, as it was not within the scope of his employment to bind the company in that way.

No doubt if the witness had been called for the defence, and had made a statement inconsistent with the statement made in the report, he might have been cross-examined and confronted with the report itself; and, even though called as he was by the plaintiff, if he had proved, in the opinion of the Judge, to be a hostile witness, it would have been competent to the plaintiff, with the leave of the Judge, to contradict him and to prove by the report itself, or otherwise, that he had made a statement inconsistent with the evidence he was then giving; but I am at a loss to see how the statement in the report can, under the circumstances, be received as evidence at all. If not receivable in evidence, it is impossible to say what effect that report may have had in influencing the decision of the jury: See *Heywood et al. v. Dodson and Lawley*, 44 L. T. R. 285.

If it had been shewn that the report had been made before the accident, it would have been relevant as bringing home notice to the company of the alleged defective state of the engine; but this report was not made until the 30th of May, the accident having occurred on the 27th.

The statement in the report, which is complained of, is "Bottom rim of bonnet in stack wants making tight."

The witness in his evidence states that, after hearing of the fire, he examined the bonnet to see if the netting was misplaced or in any way damaged, and that he found it in good order and having found it in good order, he made no report. He returned on the following day to Brockville, that he examined the engine and found it in the same condition.

It appears that on the morning of the 27th when the witness took out the engine to see if it was in good order, all around the rim of the bonnet between it and the screen by which the witness does not know, and he was at first under the impression that that was what he made the report. But as this particular engine did not go out on the 31st he comes to the conclusion that it must have been on the 27th as it must have been if the fire was put on this particular engine.

Be that as it may, the report on the 30th seems to have been made in consequence of the witness having discovered, when returning from Sand Point, on the 30th, on going up the Pakenham grade, that a stick of punky wood had caught fire in the tender. He states his uncertainty of whether that fire was communicated from the furnace or the smoke-stack, and being in doubt he made the report in question, as he puts it, "as a precautionary measure." He states that he knew of no other place from which the fire could have been communicated than the furnace, the bonnet, or from between the rims. He does not profess to state whether fire did come from between the rim and the screen, but that he had never known it do so.

The witness states that, as a fact, he did not know, and had no means of knowing, whether the bottom rim of the smoke-stack was loose, or not. If it was material to the plaintiff's case to prove that fact, it had to be proved by the testimony of the witness, not by his mere assertion, even though that assertion took the form of a report to his employers.

According to the sworn testimony, the report was made as a purely precautionary step, in consequence of the piece of punky wood being found to be on fire, on the morning of the day on which it was made, the witness having no knowledge as to the state of the smoke-stack at the time. It is not pretended that any suggestion was made that the witness was hostile, and permission asked to cross-examine him as an adverse witness; and one can well conceive that a statement, made by the witness in the report, of the smoke-stack requiring to be made tight, might have an effect with the jury which no amount of explanation on the part of the witness, and no caution on the part of the Judge, would serve to dispel; and no reasons satisfactory to my mind have been advanced in favour of its admissibility. Upon this ground alone, therefore, the verdict ought not to be allowed to stand, in my opinion; and, if this evidence is rejected, it is not by any means clear that there were facts established from which negligence might be reasonably inferred.

When it is borne in mind that the lumber was in such close proximity to the engine, and in so dry a state, that the ordinary sparks escaping from the meshes of the bonnet might easily have ignited it, and caused the injury complained of, (and there is no evidence whatever which is not quite consistent with the evidence of the only parties who had actual knowledge of the state of the bonnet and its fitting) I cannot see upon what principle the case should—if, as I say, the other facts now found by the jury had been admitted—have been submitted to a jury.

I can well understand, that if there had been a conflict of evidence as to the actual state of the bonnet-rim, the additional facts as to the previous injury, and the use of the fire-clay, might have been valuable aids to the jury in discriminating between the evidence of the several witnesses; but I cannot understand how a jury can be told that they may infer negligence, when the only witness who can testify as to the state of the smoke-stack negatives any defect in it, because it is shewn that at a previous period the bonnet had been injured, and because fire-clay was shortly after the accident applied, by whose directions not shewn, but it being proved that such a step would be usual and prudent as a precautionary measure.

The evidence of Burns does not establish any defect in the smoke-stack. He states, on the contrary, that, so far as his examination extended it was perfectly secure and safe. It was indeed suggested by counsel that when the bonnet was damaged, shortly after the engine was first used, the bonnet-rim was also damaged; and that when the hinge was moved the bonnet itself was moved around; and that in that way a space or spaces might have been left between the rim of the bonnet and the stack, or the bottom-rim; but it was not sustained in evidence; and the witness says, that, with the means he used, he satisfied himself that it fitted tight, and he then gives this evidence:

Q. When you did ultimately take off the cross-bar and bonnet by themselves, which was done, as I understand, in August, did you find any

traces at all around here of steam having escaped through these places?

A. *No. I found it full of dirt between the netting and the outside piece.*

Q. If steam did get through, do you know enough about the matter to tell us if any mark would be left? A. *I do. It would leave a mark of where the steam or water had come through.*

Q. Do you know whether steam would go through a smaller space than would be sufficient to admit a spark; which would go through the smallest space. A. *The steam would.*

HIS LORDSHIP. Do I understand you to say there was a deposit of dirt between the rim and the angle-bed? A. *Yes.*

MR. BETHUNE. What thickness? A. I cannot say; sometimes when they are out a long time we have to pry that out with a bar.

Q. Did you find any dirt between where the rim fitted on the angle-bed? A. *No. I did not find any dirt where the faces rest one on the other.*

Q. If there had been any dirt in there could you have closed the net down? A. *Not very well. If it was on the front side of the netting, you could not get it down to hinge it. Sometimes we make a lead joint between the two—a lead joint all round.*

Q. What do you do that for? A. To make a sure thing of the joint—to make it tight.

Q. Can you test in that way by putting white lead on? A. Oh, yes; if the white lead touches all round it will shew a perfect fit.

Q. Is that one of the ways in which you test? A. It is, but it is very seldom done in that line of business.

David Preston, who was examined as an expert on the part of the plaintiff, states that if an engine came off the road, and he had not time to make an examination, the fire-clay would generally be resorted to as a precautionary measure, and that is what he himself would have done.

It is also a circumstance not, I think, to be overlooked, that the plaintiff abstained for nearly four months before asserting any claim, although he was himself instituting secret inquiries, and if some of the witnesses, after the lapse of so long a period, cannot answer inquiries as readily as they might have done if their attention had been called to the circumstances immediately after the fire, no blame is imputable to the defendants, and no inference should be drawn unfavourable to them from any difficulty on the part of the witnesses in giving details as they might have done if the inquiry had been made at once.

Neither Burns nor Sharkey the boilermaker is able to say at whose instance, or by whose direction, the clay was

applied. Where, then, is the affirmative evidence of negligence?

I supposed that the "scintilla of evidence" doctrine, if I may so express myself, had long since been exploded; but unless the facts of the case have been entirely misapprehended, I fear that it was to be found in all its pristine vigour in a recent decision in one of the Divisional Courts, where a nonsuit, granted in an action for knowingly keeping a dog of ferocious habits, which bit the plaintiff, was set aside.

In that case there was not a particle of knowledge shewn at the close of the plaintiff's case, unless that was to be inferred from the defendant, when informed of the accident, offering, from motives of humanity, to pay the doctor's bill.

The plaintiff's counsel opened with a statement that he should establish notice to the partner in business of the father of the boy who was bitten—if that could possibly be evidence—but the witness who was called failed to establish it.

At the close of the plaintiff's case, the Judge at the trial allowed him to call the defendant, who proved that on a previous occasion he had heard of the dog biting some one, and gave directions to his foreman to have it destroyed; but the foreman explained to him that he was present when the biting happened, and that the boy had brought it entirely upon himself by teasing the dog, which had acted in self-defence, and that, when left alone, the dog was perfectly harmless.

How could that possibly be evidence of a knowledge by the owner of his dog's propensity to bite? But that, and the offer I refer to, was the only evidence given to sustain the issue, which was upon the plaintiff.

Lord Ellenborough, even in the days when the *scintilla* doctrine prevailed, thought that an offer to pay expenses or make compensation, which may have been made from motives of charity, without any admission of liability at all, was entitled to so little weight that he refused to submit it to a jury.

I cannot avoid thinking that the decision in that case is a departure from the rules now acted upon in reference to the functions of the presiding Judge. In the present case, I do not see how the Judge could have held that there was any evidence upon which the jury could properly find the question for the party on whom the onus of proof lay.

But, assuming that there was some evidence, ought the Court, upon the findings of the jury, to have entered a verdict for the plaintiff? With very great deference, I think not. The jury, it is true, find that the fire came from the smoke-stack, and from an imperfection in the smoke-stack, and they go on to explain that the imperfection consisted in the cone being too close to the netting; but none of the witnesses shew that that in itself would have a tendency to increase danger from the sparks; although one of the witnesses speaks of a particular shaped cone "baffling the steam," whatever that may mean.

The learned Chief Justice, of the Common Pleas Division thinks the verdict may be sustained upon that finding because Mr. Vernon Smith, one of the experts, is of opinion that a cone of a particular description (whether like the cone in use does not very clearly appear) would throw the sparks more towards the opening (that is assuming always that the opening is proved) and so makes the opening more dangerous, if the cone is flat.

Here the evidence, such as there is, goes to shew that there was no opening through which sparks could pass; and, even assuming that there was sufficient evidence to submit to the jury upon that point, they have not found it; all they do say is, that they think that the bonnet-rim did not fit to the bed so completely as it should have done.

I am afraid I shall have to differ also from the learned Chief Justice of the Queen's Bench Division in his estimate of the advantage of the new system of calling upon the jury to reply to specific questions. Its utility is never more clearly demonstrated than in actions of this nature;

and this very case is an excellent illustration of its advantage.

Had the jury given a general verdict it would have been impossible, except upon the question of the reception of evidence, or mis-direction, to move against it successfully. There was evidence which, if believed, would have been sufficient to go to the jury, to establish negligence in the management of the ash-pan, if the fire had been found to have originated from it. On a general verdict it would have been impossible to ascertain upon which ground the jury had found the negligence. On the present finding, we see that the damage was not attributable to fire from the ash-pan. But it seems to me that the benefit of this practice will be frittered away, if judgment is to be entered for the plaintiff upon such findings as these.

In point of fact, the question as to the fitting was not submitted until after the other questions had been answered, and the plaintiff's Counsel had moved for judgment.

I cannot think that, upon the former answers, it would have been competent to the Judge to enter judgment in favour of the plaintiff, although it was evident that such was the desire of the jury; and, unless there was under these circumstances a distinct finding, not that the rim did not fit as completely as it should have fitted, but that it was so defectively fitted that sparks escaped, it would be improper to hold these defendants liable. I have already intimated that, in my opinion, there is no evidence to establish the fact that such defect existed, and therefore, that a finding in that way would be perverse.

Entertaining this view, I have not discussed the further question as to the right of the plaintiff, after availing himself of the license of the defendants to store his lumber on their lands in close proximity to the track, with the knowledge of the risk to which it was exposed, to bring the action; but I think it clear it did not impose upon the company any additional exercise of care or caution in the management of their trains. If not in fault as to the management of the train, or the quality or character of its



equipments, the special risks incident to proximity must be borne by the party choosing to place his lumber in that locality. The sole question is, were the company, through their servants, negligent in the management of the train, or were the engines defectively constructed, so as thereby to cause the damage?

I do not think the plaintiff has offered such evidence of facts from which negligence might reasonably have been inferred; and I think also that, if it was not a case to be withdrawn from the consideration of the jury, their findings are not of that clear and conclusive character as would justify the Court in entering judgment upon them in favour of the plaintiff.

This appeal, therefore, should be allowed, with costs, and judgment given for the defendants.

PATTERSON, J. A.—I have given a very anxious examination to the evidence, and to the questions of law which have been discussed, and I have had the advantage of seeing the judgments which have been written by the other members of this Court, as well as the great advantage, which I have enjoyed in common with them, of the exceedingly able and exhaustive judgment of the Chief Justice of the Common Pleas.

As the result of the opinions of the Chief Justices of this Court and of the Queen's Bench, must be the dismissal of the appeal, I do not think any useful purpose would be served by my attempting a detailed reference to the evidence.

I shall, therefore, content myself with stating, as shortly as I can, the views I entertain.

I need not say that it is with much hesitation and distrust of my own opinion that I adopt a conclusion at variance with that acted upon in the Court below, and which has the strong support of the approval of the two senior members of this Court who have heard the appeal; which hesitation and distrust would, however, be greater, were it not that my opinion agrees substantially with that expressed by my brother Burton.

The question for decision by us, having regard to the answers given to the questions submitted to the jury, I understand to be: Was there evidence proper to go to the jury, that by the negligence of the defendants the cone in the smoke-stack of the locomotive was too near the netting, and that by reason of that negligence sparks escaped from the smoke-stack and set fire to the plaintiff's lumber?

It is a matter of common knowledge—and all the cases on the subject of fires caused by locomotives recognize the fact—that every locomotive will scatter sparks, notwithstanding the use of the best appliances which, without making the working of the engine impossible, can be adopted to prevent their escape.

This plaintiff, for his own convenience and profit, though with the defendants' permission, piled his lumber within six or eight feet of the smoke-stacks of passing locomotives, and to a height greater than the height of a smoke-stack.

I do not refer to this as contributory negligence. I am not about to discuss that topic. Were I to do so, I should probably make some observations upon what strikes me as an important distinction between the assertion of your right to build your house or your hay-stack, or even your gunpowder factory, at the extremity of your land adjoining the railway fence, without lessening the responsibility of the railway company for the exercise of proper care in the construction and use of its engines—in other words, the assertion of your right to use every part of your land as you please, simply because it is your land—and the placing of easily combustible property near a railway for the sake of having it as near the railway as possible.

That was what the plaintiff did. He built his piles where they were for the sake of having them as close to the track as the company could, with due regard to the safety of its passengers and servants, permit them to be. I repeat that I am speaking of this merely as a fact in evidence, and without any reference to the question of contributory negligence.

It is further in evidence that these piles of lumber were very inflammable, and witnesses explain what made them so.

We have, then, these factors: a locomotive engine which, with the best appliances, will throw some sparks; a pile of easily inflammable material, higher than the smoke-stack, and only some two yards away from it; and a fire high up in the pile, caused by sparks from the smoke-stack. And we have no evidence that that fire might not have been caused by sparks inevitably emitted.

I am unable to say that the occurrence of a fire, under these circumstances, is either evidence of negligence on the part of the railway company, or is reasonably suggestive of negligence.

I look, then, for evidence of negligence which may be fairly said to have occasioned the fire.

The fact is proved and found that there was no negligence in the use of the netting used for the bonnet, although its meshes were somewhat larger than in the netting used on another railway. In other words, while a certain amount of risk, and, I suppose I may say, a risk proportioned to the size of the mesh, was run by owners of property near the railway, the risk of fire from sparks that would pass through this mesh, though greater than if the mesh were smaller, was a risk to be run by the owners of the property and not by the railway company.

The jury said the cone was too near the netting; but there is no reasonable evidence that that was a source of danger. It is suggested that by reason of the height of the cone—not by reason of its proximity to the netting, although it is possible to understand that expression as being a round-about way of describing its height with relation to the rim of the bonnet—the sparks were deflected in a direction or at a place where, if there was an aperture between the rim and its bed, they might pass through the aperture.

But there is no proof that there was any such aperture, and there is no evidence that any aperture but the meshes in the netting was necessary in order to account for the fire.

Then there is evidence which may be said to be of a conflicting character: on the one side tending, or at least intended, to shew that the rim may not have fitted very tight, or as the jury phrased it "as well as it might have done;" and on the other side directed to prove that the rim was not out of order; and that, as a fact, sparks, or at all events, steam, did not escape by way of it. It does not strike me that this was evidence that could go further than to justify a conjecture that the rim may not have fitted. Such a conjecture could only be allowed to have force if direct evidence, such as I fail to find here, had existed, proving either that sparks did escape by the defect suggested, or that sparks must of necessity have escaped otherwise than by the meshes, before the fire could have been caused.

In this estimate of the evidence I include the report whose admissibility is disputed. But I have not been able to satisfy myself that that report was properly received in evidence.

I am unable to regard the decisions cited by the Chief Justice of the Queen's Bench as having the force which he attributes to them as authorities for receiving, as evidence at a trial, documents of the character of this report, even though their production for the purpose of discovery might be enforced.

On this question of evidence, I should use those authorities with the caution suggested by the Chief Justice of this Court. But, under the circumstances of the present case, I am inclined to take the view expressed by my brother Burton, for the reasons he has given, that the evidence was not properly admissible. On these general grounds, I am of opinion that the case ought not to have gone to the jury, but that a nonsuit would have been proper.

If this conclusion is correct, the circumstance that two juries have found the same way is, of course, beside the question.

It also follows that we need not discuss the precise effect of the findings of the jury.

I agree that we should not apply too severe a criticism to the terms in which the findings of a jury may be expressed.

But I may be allowed to repeat, what I have more than once taken occasion to say, that I regard actions for negligence as peculiarly of the class in which it is most important to have specific findings. As the charge of negligence supposes a duty to the plaintiff which the defendant has, either by commission or omission, violated; and as the due administration of justice between party and party requires that before one can be mulcted in damages, it shall be ascertained, with something like certainty, in what particular he has offended; it has always appeared to me that a jury composed of men with no special training, cannot be expected to dispose intelligently and justly of so complex a question—the injury that has happened; the damage resulting from it; the party whose act or neglect caused it; the relation of that act or neglect to the duty of the defendant; the share the plaintiff may himself have had in what happened; and possibly some other elements—in any other mode than by specifically noting their finding on each separate question.

The necessity for this becomes more urgent in cases where prejudice is likely to influence the decision.

Then again, if this necessity does exist, if it is important that the jury should not be allowed to say the defendant shall pay for the damage suffered unless they can say in what respect he has come short of the duty he owed to the plaintiff, I think we may easily go too far if we attempt to add, by any astute suggestion of what the jury may possibly have meant, to what they have actually said. I would always interpret their findings with liberality in the direction of giving effect to what they may obviously have intended to express, but if a finding as expressed stops short of stating a material fact, I think we should be reasonably certain that the fact was intended to be found, and not merely that it would not be inconsistent with the actual finding, before we extend the words so as to reach it.

I cannot help feeling that in this case we should be adding something which the jury might have found, without sufficient reason for saying they intended to find it, if we read the fourth and fifth answers together as a decision that the cone deflected sparks against the rim of the bonnet, and that because the rim was not fitted as well as it might have been they escaped.

Therefore, even if I found reasonable evidence to support such a finding, I should hesitate before holding that the jury so found.

I think our proper decision would be to allow the appeal.

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## BUIST V. MCCOMBE ET AL.

*Distress damage feasant—Abandonment—Seizure—Trespass—Obligation to fence.*

Defendant seized the plaintiff's oxen damage feasant in his wheat field, but being unable to find a pound-keeper, turned them loose near the plaintiff's gate. On the evening of the same day the defendant again seized them for doing damage to his meadow and impounded them, giving a statement of his claim for damage to the wheat, but making no claim for injury to the meadow :

*Held*, that the damage to the wheat had been abandoned, and that the impounding and sale of the oxen for the damage so claimed were illegal. The plaintiff forbade the sale, when defendant told the pound-keeper to sell and that he would be responsible :

*Held*, that the defendant and pound-keeper were both liable.

*Spafford v. Hubbell*, M. T. 2 Vict., R. & J. Dig. Col. 1517, explained.

APPEAL from the County Court of Simcoe.

This was an action by Daniel E. Buist against Thomas McCombe and Donald McDonald for trespass, in taking a yoke of oxen, the property of the plaintiff, and selling the same at auction.

The cause was brought to trial on the 13th of December, 1881, before the junior Judge of the County Court.

The nature of the evidence adduced sufficiently appears in the judgment.

At the trial the case, by consent, was withdrawn from the jury, except as to the question of damages, and they found \$100 damages, subject to the opinion of the Court in term on the legal points. In term judgment was given in favour of McCombe without costs, and against the defendant McDonald with costs.

In the April term following the plaintiff obtained a rule *nisi* to set aside the verdict entered for McCombe, and to enter a verdict for plaintiff against both defendants, or for a new trial.

After hearing counsel, Ardagh, J., discharged such rule without costs.

From this judgment the plaintiff appealed to this Court and the appeal came on for argument on the 12th of September, 1882.\*

*Osler*, Q.C., and *A. D. Cameron*, for the appellant.  
*H. J. Scott*, for the respondent.

The points relied on and cases cited appear in the judgment.

The judgment of the Court was delivered on

September 16, 1882, by WILSON, C. J.—The defendant justifies the taking of the plaintiff's oxen because the oxen were wrongfully trespassing on the cultivated portion of the defendant's farm adjoining the farm of the plaintiff, and doing damage to the crops, and while they were so trespassing he took the oxen, and under the township by-law he delivered them to the pound-keeper with a statement in duplicate of his claim for damages against the oxen.

There was no lawful fence between the parties.

The defendant said the oxen were in his field on the 11th of July, and he took them to one White's until he could see the plaintiff. He told the plaintiff if he did not keep up his cattle he, the defendant, would look for a pound-keeper. He then left the cattle near the plaintiff's gate. That same night the oxen were again in the defendant's meadow. He put them in his barn that night, and the next day he sent them to the pound with a statement of damage to his wheat of \$10. He made no claim for injury to the meadow or hay.

The judgment of the learned Judge states the evidence more fully than the notes of the trial do, and from the judgment it appears the oxen were taken in the day time of the 11th of July, damage feasant in the defendant's wheat field, and that the defendant after taking them for

\* Before WILSON, C. J., GALT and OSLER, JJ., under order of 2nd September, 1882. See ante vol. 7, p. 454.



that trespass could not find a pound-keeper, and turned them loose near the plaintiff's gate, and on the evening of that day he took them for damage to his hay or meadow.

It is clear the demand he made for damages was for that done to the wheat, and not to the hay or meadow.

The evidence therefore shewed the impounding was for a trespass which had been abandoned.

The learned Judge was of the opinion that when it is not the duty of either party to keep up any particular and defined portion of the division fence, the one whose cattle trespasses on his neighbour's land is answerable for the trespass, that is, he must keep his cattle from his neighbour's land at his own risk.

The case of *Spafford v. Hubbell*, in Rob. and Jos. Digest 1517, was cited to the contrary. It is a mere note. It is "A land owner in this country must fence against cattle: *Spafford v. Hubbell*, M. T. 2 Vic."

That note of the case was no doubt obtained by the late Hillyard Cameron from the note books of decisions of the late Robert Baldwin, which were lent to Mr. Cameron on making up his digest. The note of that case is as follows: "*Spafford v. Hubbell*, M. T. 2 Vic., a land owner in this country must fence against cattle, contrary to rule in England; *Hitchcock v. Ives*, in this Court, and Prov. Stat. 34 Geo. III. ch. 8; 48 Geo. III. ch. 4; 33 Geo. III. ch. 2, sec. 6 and Ordinance of Quebec, 30 Geo. III. ch. 4."

The words of the 33 Geo. III. ch. 2, sec. 6, are, that the inhabitants of the township are to choose a pound-keeper "who is hereby authorized to impound all cattle, &c., that shall trespass on the lands of any person *having enclosed the same by such high and sufficient fence* as shall have been agreed on in manner aforesaid."

The case of *Hitchcock v. Ives*, Draper 259, shews what the decision in *Spafford v. Hubbell* must have been.

That if the township law did not forbid cattle from running at large, or allowed them to run at large, they could not be taken for damage feasant unless the owner of the land trespassed upon had a sufficient lawful fence.

But if the township laws prohibited cattle from running at large, the owner of them was bound to prevent them at his own risk from doing damage to his neighbour, whether the neighbour trespassed upon had or had not fenced his land. In this case the by-law shews that cattle were not permitted to run at large on the 12th of July. It was therefore the duty of the owner or the owners to keep them from his neighbour's land at his own risk, which is the rule of the common law.

This case does not turn upon that point. I think the evidence shews the distress was made for the damage to the wheat; and as the distress made for that had been abandoned, it could not justify a fresh taking. It is true the defendant might seize for one cause and justify for another; but in this case he does not justify for another cause, but for the damage to the wheat.

The whole case was irregularly conducted, and the sale was not warranted. The pound-keeper plainly had no defence, and it was not pretended he had. The defendant heard the plaintiff forbid the sale, and he the defendant told the pound-keeper to go on with it, that the cattle must be sold. The pound-keeper wanted to be advised. He did not know how to act. The defendant said: "Sell the oxen and I will be responsible," and they were sold, and he became the purchaser.

The learned Judge was of opinion that as McCombe had not notice of what the irregularity or illegality complained of was, he was not responsible. His liability arises in his directing and taking part by such direction in a sale which was illegal. He should have informed himself of the legality of the proceeding or right to sell before he gave directions to make it: *Rowles v. Senior*, 8 Q. B. 677. He was put sufficiently upon his guard, if that were necessary by being told the proceeding was illegal. The sale was in effect by him as much as it was by the pound-keeper. As regards McCombe, he may be treated as a participator in the sale: *Green v. Elgie*, 5 Q. B. 99; *Wilson v. Tumman*, 6 M. & G. 236.

All persons participating in a wrongful act are liable, and on that ground the defendant McCombe has no defence. The appeal will be allowed, with costs.

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TOTTEN V. BOWEN.

*Husband and wife—Bill of sale—Chattel mortgage—Fraudulent preference—Bona fides—R. S. O. ch. 118—Pressure.*

The plaintiff was married in 1876 without any marriage contract or settlement, being possessed of about \$1,500 derived from the estate of a former husband, which she lent at different times to her husband, directly or in paying his debts, a small portion having been lent prior to their marriage. In January, 1879, on a further advance of \$200, she obtained from her husband a chattel mortgage of certain goods, farm stock, implements and other chattels, which was duly registered but not renewed. In November, 1879, she insisted upon and obtained from her husband a bill of sale and other goods, for the expressed consideration of \$300. The plaintiff and her husband continued to reside together, and apparently he had the use of the goods in much the same way as prior to such bill of sale being made, she and her sons working the farm on which the parties resided, and which had been conveyed by her husband to a trustee for the benefit of the plaintiff, the husband working or not as pleased himself. The evidence established the *bona fides* of the claim set up by the plaintiff, and for the purpose of securing a creditor of the husband she executed a chattel mortgage in her own name on the goods. *Held*, (affirming the Judge of the County Court, York), that the bill of sale and chattel mortgage were not open to objection as being given direct to the wife by the husband; and that even if her title under the chattel mortgage could not be supported for want of a sufficient change of possession, she could claim under the bill of sale, which being obtained by pressure was not a fraudulent preference under R. S. O. ch. 118.

THIS was an appeal from His Honour Kenneth McKenzie, Judge of the County Court of the County of York. The action was commenced by an interpleader order, dated 4th Oct., 1881, and tried before that learned Judge without a jury, when he found a verdict in favor of the plaintiff. The defendant thereupon obtained an order *nisi* to set aside that verdict, and to enter a verdict for the defendant, which, upon argument, was discharged, His Honour observing:

“ This cause was tried before me at the February sittings for the trial of non-jury cases, when I gave judgment in favor of the plaintiff.

"The only witness examined was the plaintiff herself. From the evidence she gave, and her manner of giving it, I was satisfied that nothing wrong was intended by her, her intention being to secure herself for the repayment of moneys she lent and advanced to her husband, the execution debtor.

"At the present April sittings of the Court for motions, Mr. Rose obtained an order *nisi* to set the verdict aside, and to enter a verdict for the defendant or for a new trial, the verdict or judgment being contrary to law and evidence.

"Mr. Delamere shewed cause and opposed the rule. If the verdict can be upheld in law, my own impression is in favor of it. I think the parties should go to the Court of Appeal and obtain the opinion of that Court in regard to the objections urged by Mr. Rose, touching the giving of a chattel mortgage from husband to wife, and a subsequent bill of sale from him to her, and on the question of the possession of the property and the working of the farm.

"For the present I will hold that the goods in question are the separate property of the wife. \* \* \* The rule will be discharged."

The defendant appealed to this Court on the following, amongst other grounds: That the "evidence shews that the plaintiff was married to George Totten in December, 1876, without any marriage contract or settlement: that she had money to about \$1,500; that she loaned these moneys to her husband partly before marriage, and partly after marriage, and probably within the first two years after marriage. That at the date of the marriage her husband lived on a rented farm in Vaughan, and she continued to reside with him there until 1879, when he purchased a farm in Etobicoke, where they were residing at the date of the seizure. That with the exception of, possibly, the grey mare, the cutter, two ploughs, the pigs and spring calves, which were said to belong to the children, all the goods in question were purchased during the time the husband lived and worked on the rented farm, and probably most of them were owned by him at the date of marriage. That in January, 1879, a chattel mortgage, with an expressed consideration of two hundred dollars, was given direct to the plaintiff by her husband, covering certain of the goods in question. The consideration does not appear to have been any advance then made, but the

sum of two hundred dollars was named, as the husband did not want the neighbours to know the amount of his indebtedness to his wife. There was no change of possession. The mortgage was not renewed. That in November, 1879, a bill of sale with an expressed consideration of three hundred dollars was given direct to the plaintiff by her husband, covering certain of the goods in question. No present advance was then made, and its object seems to have been to give plaintiff better security. There was no change of possession. That the consideration of the deed of the farm in Etobicoke was made up of the value of a lot belonging to the plaintiff's husband, given by way for exchange, and a mortgage given to the vendor. The plaintiff and her husband removed to this farm with the goods in question, save those above mentioned, and on the 12th May, 1880, he gave a deed of the property to one Amos Bean, as trustee for the plaintiff, the consideration appearing in the recitals, which were as follow :

“ Whereas the said party of the first part agreed, prior to his marriage, to deed, assign, and transfer certain property to a trustee for the absolute use of his wife, Mary Jane Totten, and the heirs of his body begotten. And whereas the said wife has since her marriage loaned certain moneys to the said party of the first part, receiving a chattel mortgage securing the payment thereof. And whereas, in consideration of the lands hereinafter described being deeded to her for the purposes aforesaid, she relinquished a first lien upon the said chattels by giving a chattel mortgage to Abel & Co., and also gave promissory notes beside said chattel mortgage for payment of the debts of the said party of the first part. And whereas the said wife has also barred her right to dower in certain lands. And whereas the said party of the first part is indebted to one Andrew McGlashan, and said McGlashan is threatening suit if not secured by mortgage on said property. And whereas the said Mary Jane Totten has agreed to bar her dower in the said mortgage on the execution of these presents, and perform the said acts on the promise that the said lands should be conveyed as aforesaid. And whereas the said party of the first part is willing to carry out the said agreement.’

The appellant submits that the respondent shews no title to the goods in question. The money was advanced as a loan. The bill of sale and chattel mortgage are

invalid as against creditors, they being direct from her husband, and the conveyance could not, as against creditors, be treated as a covenant to stand seized, as this would defeat the provisions of chapter 118, R. S. O. The bill of sale is invalid, as it is in reality a chattel mortgage, and the affidavit of *bona fides* does not comply with the requirements of the above statute. The chattel mortgage is invalid, having expired. There was no immediate and continued or other change of possession. The deed of May, 1880, if intended to be absolute and not a mortgage, was payment of the amount covered by the chattel mortgage. The bill of sale and chattel mortgage are void, as being a fraud on creditors within the provisions of chapter 118, R. S. O. In any event the appellant is entitled to succeed against the respondent as to the goods alleged to belong to the children."

The other facts of the case, and the evidence taken at the trial, appear sufficiently in the judgment.

The appeal came on to be heard on the 12th of September, 1882.\*

*Rose*, Q. C., for the appellant.

*S. M. Jarvis*, for the respondent.

The points relied on appear in the judgment.

December 29, 1882. OSLER, J.—This is an appeal from the decision of the Judge of the County Court of the County of York, in an interpleader issue. The plaintiff is the wife of the execution debtor. The learned Judge tried the case without a jury, and at the trial, and subsequently on the argument of an order *nisi* during April term 1882, held, that the goods in question were the plaintiff's separate property.

His decision as reported, was merely formal, and given with the view of enabling the parties to take the opinion of the Court of Appeal.

\* Before WILSON, C. J., GALT and OSLER, JJ., under order of 2nd September, 1882. See ante vol 7, p. 454.

The plaintiff was the only witness examined at the trial. She was married to her present husband in December, 1876, without any marriage contract or settlement. She was possessed of upwards of \$1500, derived from the estate of her former husband, and she appears to have lent the whole of it to the execution debtor, either directly or in paying his debts. A small part of it, she says about \$100, was lent to him before her marriage.

At the trial the plaintiff proved, (1) A chattel mortgage dated 14th January, 1879, from her husband to herself, of most of the goods in question. This mortgage had been duly filed, but had not been renewed. (2). A bill of sale of the same and other goods, dated 17th November, 1879, from her husband to herself, for the expressed consideration of \$300.

In March 1879, the execution debtor and his wife moved from the rented farm which they had occupied since their marriage, to a farm purchased by the former in the township of Vaughan. The stock and farming implements were taken over to the new farm. The execution debtor was then, and had been for some time previous, in embarrassed circumstances and pressed by his creditors, to one of whom, one Abel, the plaintiff afterwards gave a chattel mortgage on the property in her own name, and she also gave her own promissory notes for other debts of her husband. In May 1880, her husband conveyed this farm to one Amos Bean in trust for her. This deed recites, though untruly, that the grantor had, prior to his marriage, agreed to assign and transfer certain property to a trustee for the absolute use of his wife. It also recites that the plaintiff had, since her marriage, lent certain moneys to the grantor receiving a chattel mortgage securing payment thereof, and that in consideration of these lands being deeded to her she had relinquished a first lien upon the chattels by giving to Abel & Co., a chattel mortgage thereof, and had besides given certain promissory notes for payment of the grantor's debts; that the grantor was indebted to one McGlashan, who was threatening to sue if not secured by

mortgage on the property, and that the plaintiff had agreed to bar her dower in the mortgage and performed the other acts on the faith of the land being conveyed to the uses mentioned in the deed.

The plaintiff said, that from the time they went on the new farm she was the one who chiefly managed it. Her husband worked on it or not as he pleased, with one of her sons ; he took the produce to market but accounted for and paid over the proceeds to her. Out of the proceeds, the mortgages to Abel and McGlashan were paid by her in whole or in part.

Besides relying on the bill of sale and chattel mortgage the plaintiff also contended that she was the original owner and purchaser of the property. This, however appears to have been done merely from ignorance of her true position and not from any intention to misrepresent the facts, as her impression evidently was that, although her husband may have actually bought the property it became hers when she paid the debts he incurred for it.

The defendant contended at the trial that the mortgage and bill of sale were void, because made direct from the husband to the wife. That the advances made by her were satisfied by the deed of the farm of May 1880. That the plaintiff was not the purchaser of the chattels, and that the bill of sale was, in fact, an instrument intended to operate as a mortgage and was void, for non-compliance with the provisions of the Chattel mortgage Act, In the reasons of appeal it was further urged that both instruments were fraudulent against creditors, within R. S. O. ch. 118.

On the evidence there seems no reason to doubt the *bona fides* of the plaintiff's claim, or that she really was a creditor of her husband for a very considerable sum.

On the argument Mr. Rose very properly abandoned the objection that the bill of sale and chattel mortgage were void, merely because they were made direct to the wife by her husband, Assuming their validity in other respects, the husband would if necessary be treated as a trustee for



his wife, in respect of this property, which plainly was intended to be conveyed to her separate use as security for or as satisfaction of her claim. See *O'Doherty v. Ontario Bank*, 32 C. P. 285 ; *Sanders v. Malsburg*, 1 O. R. 178.

The question then is, whether these instruments are open to any of the other objections which have been urged against them. And first as to the chattel mortgage. I think, it may be fairly inferred from the evidence that it was given on the occasion of a present advance of the sum secured by it, viz., \$200, but, as unfortunately for the plaintiff it was not renewed, she is obliged to contend that there was an actual change of possession of the goods mortgaged. There was no apparent change of possession as she and her husband always lived together, either on the Vaughan or the Etobicoke farm, and there is nothing to shew that the goods were less in the latter's use and possession after the mortgage was made or when it fell due than they always had been. Therefore there is no evidence of change of possession in fact, and from the relationship of the parties there could have been none unless the goods had been actually removed from the farm on which they resided together. The plaintiff is then driven to argue either that there was as complete a change of possession as the circumstances would admit of, and therefore a sufficient one, or else that the case is not within the operation of the Chattel Mortgage Act. The answer to this may be that she cannot invoke the aid of the Court to convert her husband into a trustee and thus enable her to avoid the legal result which would otherwise flow from their relationship, and at the same time insist that she is by force of that very circumstance placed in a better position than she would have been if a legal trustee had been interposed, in not being obliged to register or renew her mortgage. See *Fowler v. Foster*, 5 Jur. N. S. 99 ; *Ashton v. Blackshaw*, L. R. 9 Eq. 510 ; *Ex parte Cox*, 1 Ch. D. 302.

It is unnecessary however, to determine whether the plaintiff's title under the chattel mortgage fails, as I am of opinion that it can be supported under the bill of sale of

17th November, 1879, which covers substantially all the property in dispute. I think the evidence fails to support the objection that though in form a bill of sale it was in fact a mortgage, or a conveyance intended to operate as such, and therefore void for want of the affidavit required by the second section of the Act.

In the confused blundering way in which the plaintiff has been allowed to give her evidence, expressions are to be found of equivocal meaning, but on the whole it seems pretty clear that it was intended to convey the property to her absolutely. She was evidently impressed with the mistaken idea that the property was hers, because she had paid for it, and the object she had in view in obtaining the bill of sale was to perfect her title.

The defendant then urges that the bill of sale is void, as being a fraudulent preference within ch. 118, R. S. O.

This objection is taken for the first time so far as we see in the reasons of appeal, and while the defendant is not absolutely precluded from raising it at that stage, I must observe that it is desirable that an objection of this kind should be taken at the trial, while the parties and their witnesses are present and where anything that may have been left doubtful on either side may be cleared up or explained.

The plaintiff gave the following evidence as to the bill of sale :

"Q. In November following you got a bill of sale on a lot of stock, and so on, for three hundred dollars? A. I don't know what the amount was, but the lawyer said he would secure me.

"Q. What was the money you were paying out then? A. I should have the stock in security, and my husband did not want the public to know how much money he had had of me.

"Q. You did not give him any money at the time you got that second bill of sale? A. I was giving him money all the time; I did not get a second bill of sale; the first was a chattel mortgage to secure me of the stock, and then Mr. Heward, the bailiff, told me that he would not hold the

stock for me, and I thought while I had the stock I would have the home for my children, and he did not want the public to know that he had had so much of my money; then I went to Mr. Jackes, and he said that he would draw me up a bill; I did not understand the law; he said that he would draw me a bill of sale that would secure my stock that nobody could claim it, and implements, and I told him that I had paid for them over and over again, and I wanted to be secure if there was anything that could secure me; so he drew me a bill of sale, and I paid him five dollars and fifty cents, money; and then Mr. Abel came and seized the stock and seized the land, and Mr. McGlashan was urging at the time to give him a mortgage, and I would not give any mortgage, and then I said my husband would give me the place and I would pay the debts, pay every debt.

“Q. At that time you did not make any advance, at the time of this eight hundred dollar bill of sale?—it was in order to secure you for money you had let your husband have up to that time? A. No, sir, it was the stock; I was very ill at the time; I told him I wanted him to secure my stock and implements.

“Q. At that time you did not make any further advance; it was to secure you for money that you already paid out for him? A. No, sir; I had no security for any other money, and he had money since that.

“Q. He gave you this bill of sale because you had before that paid out money for him? A. Well, sir, it was the stock that he gave me and the implements; I had bought them, some of them, and paid for them. I paid into the bank, too, for that sewing machine, the money, and the cutter I told you; that harrow I paid cash, went and paid it myself.”

An instrument by which a creditor is secured may be taken out of the scope of the Act respecting fraudulent preferences if it has been made in pursuance of some valid pre-existing contract or duty to give security, or in consequence of *bond fide* pressure on the part of the creditor. Such circumstances rebut the inference of an intent to prefer, which is what the statute strikes at.

The decisions under the recent Insolvent Acts have now, in consequence of the repeal of those Acts, ceased to be applicable. See *Brayley v. Ellis*, 1 O. R. 119. In

*Davidson v. Ross*, 24 Gr. 22, in which it was held that mere pressure would not validate a transaction otherwise coming within them, Mr. Justice Patterson at p. 64 thus stated the rule which had formerly prevailed, and which is now, as it appears to me, reinstated: "I understand the ground of all the decisions respecting pressure to be that a transaction is not *voluntary* when it originates in the will of the creditor, at whose instance it is done, and not in the will of the debtor, who only yields to the solicitation of his creditor; and it is not done *with intent* to prefer &c., if the motive is to escape the pressure which is exercised, or even to comply with a *bond fide* demand which is made, and not to prefer one creditor to another, even though that may be the necessary and obvious effect of what is done."

To the same effect is the language of the late Chief Justice then Mr. Justice Moss, p. 837: "The Act was not deemed fraudulent unless it was voluntary and spontaneous on the part of the debtor. Any influence which interfered with or controlled the will of the debtor, destroyed spontaneity, and repelled the inference that the debtor's intentions were fraudulent."

The cases of *Nunes v. Carter*, L. R. 1 P. C. 348; and *Ex parte Tempest*, L. R. 6 Ch. 70; and in our own Courts, *The Bank of Toronto v. McDougall*, 15 C. P. 475, fully bear out this statement of the law. See also *Ex parte Tempest*, L. R. 6 Ch. 70; *Smith v. Pilgrim*, 2 Ch. D. at p. 136.

Applying the rule as laid down by these authorities to the facts of the present case, I am clearly of opinion that the bill of sale is not within the Act. Transactions of this kind, especially when the creditor and debtor are nearly connected, should be closely scrutinized, but reading the evidence here most strongly against the plaintiff, it appears to me to shew that the bill of sale was procured at the instance and solicitation of the wife, and was not in fact given by the debtor with intent to prefer, but because the plaintiff in good faith insisted upon having it.

The only remaining objection to be considered is that the

conveyance of land was given in satisfaction of the plaintiff's claim. This deed was made some months after the bill of sale was given, and the consideration so far as shewn by the recitals was the abandonment by the wife of her lien under the chattel mortgage in favor of Abel & Co., assuming some further debts of her husband, and barring her dower in some other lands. It does not appear to us in any way to affect her right under the bill of sale.

On the whole we are of opinion that both the justice and the law of the case are with the plaintiff, and that the appeal should be dismissed, with costs.

WILSON, C. J., and GALT, J., concurred.

*Appeal dismissed, with costs.*

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LOWSON ET AL V. THE CANADA FARMERS' MUTUAL  
INSURANCE COMPANY.

*Mutual Ins. Co.—R. S. O. ch. 161, sec. 61, application of—Judgment in Appeal, mode of enforcing.*

*Held* [reversing the decision reported 9 Pr. R. 185, which followed the decision in 8 Pr. R. 433], that R. S. O. ch. 161, sec. 61, providing, as to mutual insurance companies, that no execution shall issue against such company upon any judgment until after the expiration of three months from the recovery thereof, does not apply where the judgment has been recovered on a policy issued by the company on the cash principle.

*Lount v. The Canada Farmers' Ins. Co.*, 8 Pr. R. 433, overruled.

The proper way of enforcing a judgment of the Court of Appeal is, to have the judgment of the Court below amended, if necessary, according to the judgment in appeal; and when amended to issue process thereon. Sec. 44 of the Appeal Act, R. S. O. ch. 38, is not superseded by sec. 14 of the O. J. A.

THIS was an appeal by the plaintiffs from an order of Boyd, C., made under the circumstances following :

After the judgment of this Court, reported ante vol. vi. p. 512, the plaintiff carried into the Chancery Division the certificate of the judgment of this Court, reversing a decree of Spragge, C., dated September 1st, 1880, and ordering payment by the defendants, the company, to the plaintiffs, of the amount of the policy held by them, with interest and costs, amounting in all to \$4,502.18, together with the costs of the Court below; and on December 12th, 1881, an order in Chambers was obtained making such judgment an order of the Chancery Division, and on the same day the clerk of records and writs, upon the application of the plaintiffs' solicitor, issued writs of *fi. fa.* goods and lands directed to the sheriff of Wentworth for such amounts.\*

\* The writ was as follows: "In the High Court of Justice, Chancery Division: Ontario. Writ of *fi. fa.*: Between William Lowson, Thomas Hunter Cox, John Leng, and the Dundee Mortgage and Trust Investment Company (limited) (Appellants), Plaintiffs; and The Canada Farmers' Mutual Insurance Company and William S. Boyd (Respondents), Defendants. Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of the county of Wentworth, greeting. We command you that of the goods

Thereupon the defendants, the company, moved before the Master in Chambers to set such writs aside, on the ground that the company was "a mutual insurance company within the provisions of the Revised Statutes of Ontario, ch. 161, and that the said writs of execution were issued within three months of the recovery of judgment by the plaintiffs, contrary to the provisions of section 61 of that Act, and on the ground that there was no order or judgment directing or authorizing the issue of writs of execution."

After hearing counsel for the respective parties, an order was made discharging such writs with costs, on the ground that the same had "been issued too soon."

The plaintiffs thereupon appealed from such order of the Master, and the appeal came on to be argued before the Chancellor [Boyd], who, on February 1st, 1882, made an

and chattels of The Canada Farmers' Mutual Insurance Company in your bailiwick, you cause to be made the sum of \$4,502.18, and also interest on the sum of \$3,888, parcel thereof, from the 28th day of November, A.D. 1881, which said sum of money and interest were lately before the Justices of our High Court of Justice in a certain cause, wherein William Lowson and others are plaintiffs, and The Canada Farmers' Mutual Insurance Company and another are defendants, by a judgment the Court of Appeal of Ontario, bearing date the 28th day of November, 1881, adjudged to be paid by the said The Canada Farmers' Mutual Insurance Company to the appellants, together with certain costs in the said judgment mentioned, and which costs have been taxed and allowed at the sum of \$607.08, as appears by the said judgment. And that of the goods and chattels of the said The Canada Farmers' Mutual Insurance Company in your bailiwick you further cause to be made the sum of \$607.08, together with interest thereon from the 28th day of November, A.-D. 1881, and that you have that money and interest before our justices aforesaid at Toronto, immediately after the execution hereof, to be paid to the said appellants in pursuance of the said judgment. And in what manner you shall have executed this our writ make appear to our justices at Toronto, immediately after the execution thereof; and have there then this writ. Witness: The Honourable John Hawkins Hagarty, President of our said Court, the 12th day of December, 1881, in the 45th year of our reign.

GEORGE M. LEE, Clerk of Records and Writs.

Mr. Sheriff: Of the goods and chattels of The Canada Farmers' Mutual Insurance Company, (limited). levy the sum of \$4,502 18, being the amount to be recovered under the judgment, and the sum of \$607.08, the costs of the appeal taxed, with interest on both sums from the 28th November, 1881; also the sum of \$5.00 for this writ, together with your fees, poundage and incidental expenses.

Yours, &c., A. J. CATTANACH, Plaintiffs' Solicitor.

order dismissing such appeal, with costs. See 9 P. R. 189, and thereupon the present appeal was brought on the following, amongst other grounds: (1) "that the company, under the Act of Canada, 31 Vict. ch. 93 (passed May 22nd, 1868), became a Dominion corporation, with power to effect contracts of insurance with any person whomsoever against loss by fire, upon any property whatever, situate within the Dominion of Canada, for such consideration and subject to such conditions 'as may be agreed upon between the company and the persons agreeing with' the company for insurance, and generally to do all things necessary to promote such objects. The corporate name under which the company had been incorporated under the Act of the Province of Canada (14 and 15 Vict., ch. 163), was also changed by this Act. Such full powers were granted to the company for transacting the general business of insurance independently and irrespective of any powers for effecting policies on the mutual principle, which were also extended over the Dominion, subject to the provisions in that respect contained in the former Act of the company. (2) Having become a Dominion corporation in 1868, the respondent company was not affected by or subject to any of the provisions of the Revised Statutes of Ontario, ch. 161 (formerly 36 Vict. ch. 44), the 61st section of which was held in the Court below to apply to such company. (3) The case of *Orr v. Beaver and Toronto Mutual Ins. Co.*, 26 C. P., p. 141, expressly decides that under similar circumstances that company became a Dominion incorporation, and that the Act of Ontario, 36 Vict. ch. 44, did not therefore apply. The case of *Storms v. Canada Farmers' Ins. Co.*, 22 C. P., p. 95, may also be referred to as shewing that in the opinions of Hagarty, C. J., and Gwynne, J., this company had become a Dominion incorporation, and therefore not within the Statute of Ontario. (4) The 79th section of the Revised Statutes is similar to the 77th section of the Act 36 Vict. ch. 44, and its provisions apply only to every mutual fire insurance company doing business in this Province, and incorporated under chapter 52, Consoli-



dated Statutes of Upper Canada, or chapter 44 of 36 Vict., or any special Act of the former Province of Canada, or of Ontario. (5) The respondent Company's powers to carry on business, under which the contract of insurance in question was entered into, were derived from the Dominion Act of 1868, which absorbed whatever powers had existed under its former Act, except such as by reference were expressly or by implication incorporated therein. It, therefore, became a new corporation, with different relations, and incidents, and capacities, for the transaction of the business of insurance. (6) Moreover, the property the subject of the contract, and the contract itself were without the Province of Ontario, and not within the scope or operation of the revised statute. (7) This statute is also expressly limited to transactions on the mutual principle and between mutual companies and members insured therein on the mutual principle, and this section 51 is restricted, and has reference only to liabilities on judgments obtained by any such member. See *Ballagh v. Royal Mutual*, 5 A. R. 87; also *Mutual Insurance v. Frey*, 5 S. C. 82. (8) It is opposed to every rule of construction respecting statutes, that a limitation intended for a special purpose should be extended further, and certainly not so as to defeat rights created and secured by the general law of the land. See *Hammersmith, &c., R. W. Co. v. Brand*, L. R. 4, H. L. 204-210; *Maxwell* on Interpretation of Statutes, pp. 54, 184, 257.

“The case of *Lount v. The Canada Farmers Ins. Co.* 8 P. R. 433, relied upon by the Master, and also by the Chancellor, as a decision which governs the present question, has either no application, when the principle of its decision is understood, or is not binding on the Court of Appeal. The policy in that case was *prima facie* a contract on the mutual principle, although said to be effected for a cash premium, which is clearly permitted to companies insuring on the mutual principle under the Revised Statutes of Ontario, and the decision could only be supported on this view. This distinction is drawn by the Court of Common

Pleas in *Welsh v. Niagara District Mutual*, 27 C. P. 134, which in effect overrules that in the Practice Court.

"In case of any irregularity in the issuing of the writs, this Court has full power to make an order to amend *nunc pro tunc*, but the required procedure was followed here. See *Crump & Evans*, Procedure under Judicature Act, Ch. Div., p. 343, form in appendix ; *Taylor & Ewart*, p. 338."

The respondents, the company, in support of the order of the Chancellor, alleged that "the writs of execution were irregular and void, being issued out of the Chancery Division of the High Court of Justice, without any judgment having been given by that Court or entered therein authorizing such writs of execution ; that sec. 44, ch. 38 R. S. O., is superseded by sec. 14 of the Judicature Act, and the only and proper mode of enforcing the judgment of the Court of Appeal is by execution issued out of that Court. If this view is not correct as to the whole judgment, the execution for the costs of the appeal should at least be issued out of the Court of Appeal ; and sec. 61, ch. 161, R. S. O., relates to civil procedure, over which the Legislature of Ontario clearly has jurisdiction, and the defendant company is one of the companies referred to in sec. 79 of that Act."

The appeal came on to to be heard before this Court on the 9th day of March, 1883.\*

*Cattanach*, for the appellants.

The respondents did not appear.

June 29, 1883. BURTON, J. A.—The principal question raised on this appeal is, whether the 61st section of the R. S. O. ch. 161, the Act respecting Mutual Insurance Companies—which enacts that no execution shall issue against the company upon any judgment until after the expiration of three months from the recovery thereof—applies to the defendants' company, or if it does so apply, whether it extends to judgments on policies issued otherwise than

\**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ. A.

on the mutual system. It was contended that by reason of the passage of the Dominion Act 31 Vict. ch. 93, entitled "An Act to amend the Acts relating to the Canada West Farmers' Mutual and Stock Insurance Company, and to change the name of the company to "The Canada Farmers' Mutual Insurance Company"—the defendants became a Dominion corporation, and were not affected by the provisions of the general Act, which were extended only to companies doing business in this Province, and incorporated under chapter 52 of the Consolidated Statutes of Upper Canada, or 36 Vict. ch. 44, or any special Act of the former Province of Canada or of Ontario.

We were, in support of this contention, referred to a case of *Orr v. The Beaver Mutual Insurance Company*, decided in the Common Pleas, 26 C. P. 141. That case is, however, very distinguishable from the present. Two companies having formed themselves into companies under the general Acts respecting Mutual Insurance Companies in the former Province of Upper Canada, sought and obtained from the Dominion Parliament a special charter of incorporation under one common name; and the decision proceeded upon the ground that the united company never had any existence except under that charter, and that the R. S. O., which applied in terms only to the companies I have mentioned, did not extend its provisions to it.

Here the Dominion Act, as its title implies, does not profess to incorporate the company, but assumes to make some amendments, rightly or wrongly, to their Act of Incorporation, which had been granted by the Parliament of the old Province of Canada, and amended by the Local Legislature.

I think there can be no doubt, therefore that the R. S. O. ch. 161 did apply to this company, and the question is to what extent.

Looking at the object with which the section in question was at first introduced in relation to these companies, which were originally restricted to making assessments after the losses occurred, the first impression one would

form of such a provision would be that it could only be intended to apply to a judgment upon a policy issued to a member upon the mutual principle; but when we come to examine the various Acts relating to mutual insurance, and find how completely the principles regulating insurances of that character have been lost sight of; that the companies have power to assess for any sums, as the directors may determine, and without reference to any actual loss; and that the assets of the company, including the premium notes, are made liable for losses which arise under insurances for cash premiums, it seems difficult to say for what purpose the section is retained at all.

It must not, however, be lost sight of that the particular enactment, which is to be found in the Revised Statutes, and which we are now called upon to construe, was passed at a time when, as I humbly conceive, the Legislature had come to adopt a much safer and more reasonable policy in reference to mutual insurance companies than they had previously done, and from which I regret to add they have in subsequent legislation wholly departed.

By the 36 Vict., ch. 44, which is the act to be found in the Revised Statutes, sec. 51, now sec. 55, in the Revised, it was declared that no mutual insurance company incorporated under that Act, or the revised Act, should issue policies otherwise than upon the mutual principle. All the enactments in it have reference to such insurances; although the rights of certain companies incorporated before the 29th March, 1873, are, by section 75, with certain modifications, preserved to them.

The other clauses deal, however, with and were intended to apply only to mutual policies; and when we turn to the clauses under the heading "Payment of losses," where this particular section is found, we find they all refer to members:

56 provides for the directors ascertaining and determining the amount of the loss by a member insured.

57, that if such member is dissatisfied, it may be left to arbitration.

58 limits the time for bringing actions.

59, that if, upon the trial of *such* action, a greater amount be recovered than the amount determined upon by the directors, or the amount awarded, the member may recover judgment with interest from the time the loss would be payable under section 56, with costs of suit.

60, if no more recovered than the amount determined, and such amount has been tendered, the plaintiff shall have judgment for such amount only, without costs, and the defendants shall be entitled to costs.

And then comes the section in question.

Now it is, I apprehend, a clear canon of construction, that however general the words of an enactment may be they are to be construed as particular if the intention be particular: in other words, they must be understood as used in reference to the subject matter in the mind of the Legislature, and to it only.

It is true, as is well expressed by the late Master of the Rolls, in *Nuth v. Tumplin*, 8 Q. B. D. 253, that any one who contends that a section of an Act of Parliament is not to be read literally, must be able to shew one of "two things—either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act."

Here the general object of the Act was, to regulate mutual insurance companies, and we should not expect to find a clause in it altering the general policy of the law, unless of course no other sense can reasonably be applied to it. That general policy is, that whenever a creditor obtains a judgment in a Court of Law he can at once issue execution. Reasons existed which in the case of mutual insurance rendered it desirable, in the opinion of the Legislature, to defer execution for six months, originally, now reduced to three.

If the Revised Statutes had omitted sec. 77, making its provisions applicable to certain companies then in existence, could there be the slightest doubt as to the meaning of sec. 61? It would mean clearly and unmistakably that

in the case of a judgment obtained upon a mutual policy execution shall not issue under three months, and would not extend to a judgment obtained against this same company in an action for libel, or for goods sold and delivered to them. Is that construction to be altered, and a wider interpretation given to it, because it is declared that it shall apply to certain companies which besides doing a mutual business are authorized to do something else? It is the clause as it is, that is to say: as applying to judgments recovered upon a mutual insurance policy, which is imported into the other Act, and it is not to receive any different interpretation when so imported than it would have borne had sec. 77 been entirely omitted. It is, in other words, to extend to such companies where losses are sustained upon a mutual policy the rights which an ordinary mutual insurance company, not doing a general insurance business enjoys as to the delay in issuing execution.

The result is, that this company, which by its special Act was entitled to no delay, even in the case of mutual policies, becomes under this Act entitled to a delay of three months; but no reason whatever exists for extending it to those policies which, under its charter, it can issue to strangers under the general or proprietary branch of its business. I am of opinion, therefore, that the case of Lount against this company was wrongly decided, very probably from the circumstance, of which we also have some right to complain, that the attention of the Court was not drawn to the fact that the Act in which the restriction occurs relates solely to mutual policies.

The plaintiffs were, therefore, entitled to issue the execution immediately upon the entry of the judgment.

It is, however, contended that the writ was irregularly issued, having been issued by the Chancery Division of the High Court without any judgment having been given by that Court, or entered therein, authorizing its issue.

If I understand this objection aright it is, that sec. 44 of the Appeal Act has been superseded by sec. 14 of the Judicature Act, and that the proper mode of enforcing the

judgment of the Court of Appeal is by execution issued out of that Court, or at least so far as the costs in appeal are concerned.

This proceeds upon an entire misapprehension of the law regulating appeals as it now stands under the Appeal Act, ch. 38 of the R. S. O. Under that Act an appeal is only a step in the cause, the Court having under sec. 23 the same power to give any judgment or to make any decree which ought to have been made, and to direct the issue of any process or the taking of any proceedings in the Court below, or to make such other order as the case may require.

The registrar of this Court is directed, under sec. 44, to certify the decision of this Court to the proper officer of the Court below, whose duty it becomes to make the necessary corrections on the roll or judgment; and upon the judgment thus corrected the subsequent proceedings are taken. In other words, the judgment is made to conform to the decision of this Court, and execution issues to enforce the judgment of the High Court as thus amended.

The execution does not issue, as it was contended it should do, on the certificate. The certificate is merely the mode of conveying the information to the proper officers of the Court below of what has been done in this Court, so that he may amend the judgment in accordance with it.

The power intended to be given under sec. 14 of the Judicature Act, which is copied from the English Act, this Court probably already possessed under sec. 23.

The writs appear to us, so far as we can judge, to be quite regular upon their face, although a reference to the judgment of the Court of Appeal was unnecessary; and the appeal should, I think, be allowed, with costs, and the motion to set aside the writs discharged with costs of both applications.

PATTERSON, J. A.—Upon the question of the three months' delay which the company claims between judgment and execution, I take the same view of the statute as my brother Burton, but I shall attempt to explain it in my own words.

The company was incorporated in 1851, by the Statute of Canada, 14 & 15 Vict. ch. 163. The stock was to be of two descriptions—mutual and proprietary; “and also,” it was declared, “that the members of or persons composing the said company shall in like manner consist of and be divided into two classes, namely: those who deposit premium notes for the purpose of mutual insurance, denominated mutual members; and proprietary members, or those who hold shares in the proprietary stock of the said corporation: provided always, that nothing herein contained shall prevent the same person from holding at the same time both descriptions of stock.” Power was given to the company to effect insurances either on the mutual or cash principle, subject to certain restrictions.

There had been in force in Upper Canada ever since 1836, the statute 6 Wm. IV., ch. 18, which was the general Act authorizing the establishment of mutual insurance companies. The fourteenth section of that Act established certain rules of procedure in case of losses by fire. In the Consol. Stat. U. C., ch. 52, it was broken up into five sections, numbered 68, 69, 70, 71 and 72. Those sections are now represented, with slight modifications immaterial at present, in the R. S. O. ch. 161, by secs. 56, 57, 59, 60 and 61 respectively. Sec. 58 comes from elsewhere. The original section dealt with the case of losses by fire happening to *any member* upon property insured with the company, and the same phraseology was retained in the Consolidated Statute, and in 36 Vict. ch. 44, which is the Act which found its way into the Revised Statutes. The original sec. 14, after bringing its enactments to the point of judgment against the company for the amount of the loss, concluded thus: “*Provided always*, that no execution shall issue against the said company upon any judgment until after the expiration of six months from the recovery thereof.” These words (putting *three* for *six* months, and omitting “*provided always that*,”) are those of the present sec. 61, as they were those of C. S. U. C. ch. 52 sec. 72.

Now, when the defendant company procured its charter



in 1851, this section 14 of the general Act was taken as the model for its procedure, which was provided for by the 20th section of its special Act. The language of sec. 14 was adopted, with some unimportant additions of details, but with two important modifications. The company did not propose to confine its risks to those who were members in the sense in which policy holders in mutual companies were *ipso facto* members of those companies; and therefore the procedure was made applicable to every case of loss or damage by fire happening to *any property* insured with the company, not confining it, as in the general Act, to loss happening *to a member*. That was one modification. The other, which was doubtless also suggested by an intelligent regard to the difference between the company then being incorporated and the ordinary mutual insurance company, was, the omission of the proviso giving time after judgment before an execution could issue.

No such exemption from immediate process as is now claimed could have been asserted under the special Act, and nothing in that direction was accorded by any of the Acts which the company procured in amendment of its special Act,—27 & 28 Vict. ch. 101; 29 Vict. ch. 94; 31 Vict. ch. 93 C.

It happened, however, that the Legislature of Ontario, in 1873, passed the Act 36 Vict. ch. 44, to consolidate and amend the laws having reference to mutual fire insurance companies in the Province of Ontario. That Act contained, as I have remarked, the *disjecta membra* of the 14th section of 1836, and it contained in section 77 (which is sec. 79 of R. S. O., ch. 161), the enactment that: "The provisions of this Act shall apply to every mutual fire insurance company doing business in this Province, and incorporated under the Act of the Consolidated Statutes for Upper Canada, or any special Act of the former Province of Canada, or of Ontario."

It may be that the object in view in this extension of the new statute to all these companies was, to bring them under the restrictive or controlling enactments on the sub-

ject of conditions of insurance and other matters, without any direct design to enlarge the powers or immunities which the Legislature had accorded to the companies by the special Acts which had been passed at their instance; yet if the provisions so applied tell in favour of any company, it has of course a right to avail itself of them. There may be a question as to how far this section 79 requires us to treat the provisions of a special Act as either modified or extended by those of the general Act which deal only with the same subject matter; but that question does not, as it strikes me, arise at present, because, assuming the restriction of immediate execution to apply to this company, I think it can only be held to apply to its mutual branch.

The *name* of the company, when it insures on the cash principle as well as when it insures on the mutual principle, is undoubtedly the Canada Farmers' *Mutual Insurance Company*, just as it would be if the company engaged in transactions that had no relation to insurance. We are concerned with the operations of the company rather than with its name. Those are of two kinds, and are, under the terms of the special Act, conducted by or in the interest of separate sets of members or stockholders.

It is a mutual insurance company when it does business in mutual insurance, and it is a stock company, notwithstanding its name, when it insures in the proprietary branch on the cash premium principle. The Act extends to the "mutual insurance company doing business in this Province," or, in other words, it regulates the mutual insurance business done in this Province by any insurance company incorporated under the class of Acts specified.

Thus the force of section 79 fails to reach this company on the side of it to which, in accordance with our judgment in this action, we have to treat the policy now in question as belonging.

But, apart from this effect of section 79, I do not think we could properly read the words "any judgment," in section 61, as referring to other judgments than those recovered

under sections 59 and 60. Those are plainly judgments recovered by *members* of mutual insurance companies in respect of losses "happening to *any member* upon property insured with the company." In their origin in the proviso to section 14 of the Act of 1836, the words could not on any fair construction have been separated from the rest of the section so as to receive a more extended meaning, and I think their connection with the context must still be regarded as confining them to the judgments there dealt with.

In this view of the matter the decision in *Lount v. The Canada Farmer's Insurance Company*, 8 P. R. 433, which was followed in the judgment now in review, must be held to have proceeded upon an erroneous application of the statute.

The other question, touching the form of the writ of *fi. fa.*, involves nothing but an amendment, if amendment is necessary. Its statements are substantially true, and there is nothing in the want of technical accuracy to make it our duty to set aside the writ. It is properly issued out of the High Court of Justice. The judgment, both for debt and costs, is a judgment in the original action. It was unnecessary to state in the writ that the recovery in the High Court was by a judgment of the Court of Appeal, but that statement is true and does no harm.

I agree that we should allow the appeal, with costs.

SPRAGGE, C. J. O., and MORRISON, J. A., concurred.

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## HEDSTROM V. TORONTO CAR WHEEL COMPANY.

*Agreement to purchase certain brand of iron—Offer to deliver a different brand—Action for refusing to accept.*

The defendant company agreed to purchase from the plaintiff a quantity of iron called "Depere" iron, the plaintiff to deliver the same as the defendants should require for their works. The plaintiff subsequently without any requisition from the defendants shipped to them nearly the whole quantity agreed for, of another brand of iron, manufactured by a different company, though using the same ore and fuel and making the same grade of iron as the Depere Company. The defendants refused to accept the iron offered:

*Held* (affirming the judgment of the Court below, 31 C. P. 475) that the defendants were not bound to accept the iron so tendered, neither could the plaintiff recover the value thereof, the iron being a different article from that contracted for.

THIS was an appeal by the plaintiff from the judgment of the Court of Common Pleas, making absolute a rule *nisi* setting aside the verdict for the plaintiff on the first, third and fourth counts of the declaration, and entering a verdict for the defendants upon the issue thereon, and reducing the verdict for the plaintiff on the second count to \$19.64.

The facts of the case appear in 31 C. P. 475.

The appeal came on to be argued 23rd January, 1883.\*

*Bigelow*, for the appellant.

*Geo. Kerr* and *Akers*, for the defendants.

The cases cited appear in the case in the Court below.

February 2nd, 1883. SPRAGGE, C. J. O.—The case presented for our decision is so fully dealt with in the judgment of the Court below, delivered by Mr. Justice Galt, that after reading and considering the evidence, oral and documentary, in the case, and the law applied to it in the judgment delivered, it appears to me unnecessary to add much to what is contained in the judgment.

To leave out of the case the iron contracted for, and delivered, and accepted, and paid for, there remains as the subject of contest the six hundred tons of iron, residue

\**Present*—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ. A.

of the one thousand tons secondly contracted for by the defendants. The contract as to that one thousand tons was that it should be of the description of iron called "Depere," or "National Depere." The contract was varied only as to four hundred tons of it, by an agreement that two hundred tons of it might be what is called in the correspondence Menomenee iron. That four hundred tons was delivered and paid for. The agreement to accept two hundred tons of Menomenee iron, being the only point in which the contract was varied, it follows that the contract could only be carried out by the plaintiff or the manufacturers whom he represented, by the delivery of the residue of the iron of the description called Depere; and the onus was upon him to shew that he was ready and willing, and that he offered to deliver the residue of the iron of that description and brand; and that it was through the default of the defendants that it was not delivered.

Unless the iron that was on board the "Bruce" was Depere iron, the plaintiff has failed to prove that he performed his part of the contract. But in truth the plaintiff scarcely contends that the cargo on board the Bruce was of iron, known in commerce as Depere iron. In his examination before the trial he says that which amounts to an admission that it was not. He certainly does not in any of the evidence given prove that it was. The necessary conclusion from the evidence is that it was Menomenee iron. His case is that it was the same iron under another name, and he offers evidence to prove that it was so. Mr. Meeker, a manufacturer, says: "There is not any difference between Menomenee and Depere iron. There are two companies. The National Iron Company was a company under the laws of the state of Wisconsin, the Menomenee was under the laws of the state of Michigan. They were about fifty miles apart, but they used the same ore, the same fuel, and made the same grade of iron. I was president of both companies, and my firm were agents for both," &c. The plaintiff desires it to be inferred that the two irons were identical. What Mr. Meeker says does not prove

them to be identical. At the most he shews certain elements of identity ; but the workmen and the machinery may have been better at the one place than at the other ; or there may have been other conditions in relation to the manufacture, which would give a better result as to quality at the one place than at the other. But it is not necessary to shew this. A contract to furnish Depere iron is not satisfied by furnishing Menomenee iron ; and would not be so although it were shewn that the conditions of manufacture were in all respects the same at the latter place as at the former ; and that the quality was equally good. The answer is, it is not the article contracted for.

What makes it the more plain in this case is, that in the dealings of these parties they all along treated these two irons as different. A notable instance of this is, in the plaintiff's letter of 31st January, 1874, in which he speaks of having two hundred tons of each (the Menomenee under the name of Michigan,) in Toronto ; and on 5th February he writes : "We would like to put in two hundred Michigan in lieu of Depere for February and March." The answer preserves the same distinction. "Regarding the brand of iron we would prefer having the first lot Depere, as we have a good deal of Michigan on hand at present, and none of the other in hand." The plaintiff's reply also preserves the distinction, "We will deliver the Depere first as you request, only it was a little more convenient to arrange the other way." After this distinct recognition that the two were different ; after asking permission to substitute the one "in lieu of" the other, it is idle to contend that they are the same. It borders on effrontery for the plaintiff to say that he was entitled as a matter of right to supply six hundred tons of Menomenee iron in fulfilment of a contract to supply that quantity of Depere iron—in fact to force it upon the defendants ; and that, too, after the complaints made by the defendants that the Menomenee iron delivered proved to be less fit for its purpose than the Depere.

There is nothing in the plaintiff's contention that the defendants fell into difficulties ; and that it was that circum-

stance, and not any difference in the iron, that was the reason for its non-acceptance by the defendants. Assuming that it was to the advantage of the defendants that the plaintiff did not fulfil his part of the contract, and did not offer to fulfil it; and that the defendants gladly availed themselves of this failure on the part of the plaintiff, it could not relieve the plaintiff from the onus of proving what it lay upon him to prove, or give him a right of action which otherwise he would not have.

There is some evidence of the Menomenee iron supplied not being of good quality. I think that it is beside the question which is raised upon this issue, and have therefore attached no weight to it one way or the other.

There cannot, I apprehend, be any doubt as to the law of the case. If authority were needed we have it in the case of *Bowes v. Shand*, L. R. 2 App. Ca. 455, cited in the Court below. The language of Lord Cairns, p. 468 is: "The plaintiff who sues upon that contract has not launched his case, until he has shewn that he has tendered the thing which has been contracted for; and if he is unable to shew that, he cannot claim any damages for the non-fulfilment of the contract." And the language of Lord Blackburn in the same case, p. 480, is also apposite: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it." *Johnson v. Raylton*, 7 Q. B. D. 438, may also be referred to in affirmance of the same doctrine, for though Bramwell, L. J., differed from the other members of the Court, it was upon a point which does not touch this case. The point was, whether in a contract by a manufacturer to supply certain articles, he being a manufacturer of such articles, there was an implied contract that the articles should be of the manufacturer's own make. The articles in that case were ship plates. At the trial evidence was tendered and rejected, that in the iron trade there was a custom that under a contract between a manufacturer of iron plates and a customer, for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of

his own make ; and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for. Lords Justices Cotton and Brett were of opinion that it was an implied term of the contract that the plates should be of the make of the seller; and L.J. Bramwell, while differing from them upon that point, yet held that evidence of the custom was improperly rejected. The result was, that the whole Court agreed that if a contract be made for the supply of an article made at a particular manufactory, the customer is not bound to accept an article manufactured elsewhere, even though it be shewn to be of equally good quality. Cotton, L. J., after stating the contention of the customer that he was not bound to take goods not of the make of the manufacturer " even though the goods tendered be, as in the present case was admitted to be the fact, as good as those made by the plaintiffs," adds : " But it is contended in support of the judgment, that as regards ship plates of a particular description, and to satisfy a specified test, it is immaterial to the purchaser by whom the plates are made. I cannot agree with this argument."

*Borrowman v. Drayton*, 2 Ex. D. 15, may also be referred to as an instance of the strictness of proof required in actions for not accepting goods which the plaintiff alleges that the defendant contracted to purchase. Mellish, L. J., in that case put what the defendant was entitled to say shortly thus, p. 20, " The thing which you offered me was not the thing I agreed to buy ; and therefore I will not take it," language, I may add, which might be used with better reason in the case before us than in the case cited.

These cases settle the law upon, as it appears to me, a plain common sense footing ; that a customer is entitled to insist upon having what his contract provides that he shall have ; and is not bound to accept some other thing of the like description, even though it be shewn that that other thing is of equally good quality : not however that it is necessary to go so far in this case, for the plaintiff in this case does not shew that the iron which he has insisted upon the plaintiff accepting as in fulfilment of his contract, is of



equally good quality and equally suitable for the defendants' purposes as the iron which they contracted to purchase.

In my opinion the judgment of the Court below should be affirmed, with costs.

BURTON, PATTERSON, and MORRISON, JJ. A., concurred.

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BOYD ET AL. V. GLASS.

*Fraudulent assignment—Pressure.*

One S., a trader, who was in embarrassed circumstances, on consultation with W., one of his creditors, was advised by him to make an assignment of all his stock-in-trade and effects, which he did to his wife, in whose name the business was afterwards carried on, she obtaining from the plaintiffs goods on her own credit; and on the plaintiffs agreeing to settle the claims of two other creditors, which they did, she executed to them a chattel mortgage on all the effects in her shop. The sheriff having seized the goods under an execution at the suit of another creditor, the plaintiffs instituted interpleader proceedings. *Held*, that the mortgage to them was a fraudulent preference, and as such void against creditors.

THIS was an appeal by the plaintiffs from a verdict pronounced by Davis, Junior Judge of the County Court of the county of Middlesex, on the 10th day of July, 1882, in the matter of an unlawful seizure by the defendant, the sheriff, whereby he found that certain goods, chattels, and effects seized under an execution, were then the property of the execution debtor, one William Stanbury, as against the plaintiffs who claimed under a chattel mortgage made by Sarah Stanbury, wife of William Stanbury, and the said William Stanbury to them, dated 31st October, 1881.

The plaintiffs claimed for an illegal seizure under the writ, on the ground that before the issue thereof the goods had been sold by William Stanbury to his wife, and that she, together with her husband, joined in a mortgage thereof to the plaintiffs for the purpose of securing \$250 balance due the plaintiffs for goods sold, and also \$218.76 for moneys paid by them to two other creditors of Mrs. Stanbury.

The case came on for trial before the County Court on the 7th July, 1882, when it was insisted for the defendant that at the time of making the chattel mortgage to the plaintiffs, Stanbury and his wife were insolvent and unable to pay their liabilities in full, and knew themselves to be insolvent, and made the said mortgage with intent to defeat and delay their creditors: that said mortgage was void as against the creditors of said William and Sarah Stanbury; and that the said mortgage was given in pursuance of a fraudulent scheme concerted between plaintiffs and the Stanburys, for the purpose of hindering, delaying, defeating and defrauding their creditors.

The following evidence was taken at the trial:

**JAMES WATSON:** I was one of the firm of plaintiffs; had dealings with William and Sarah Stanbury; our first dealing with Sarah Stanbury was on the 20th January, 1881; no goods were sold to her husband after that date; she gave notes for what she bought; this went on to October; she owed about \$250 in October; I had dealings with two of her other creditors, Edward Adams & Co, and Robinson, Little & Co.; \$218.76 was the amount of their claims; I gave checks to them for their claims; I took a chattel mortgage from her and her husband upon all their stock-in-trade for the full amount; the goods so secured were sold a few days after by the sheriff; the Stanburys had no assets but what was included in the chattel mortgage; I knew on the 28th October about a Chancery suit against the Stanburys, and knew they lost the suit, and had been ordered to pay the costs. The chattel mortgage is dated October 31st. Up to January 20th we had dealings with William Stanbury, and after this he conveyed all his property to his wife, who assumed his debts. I was consulted about it. I understood she had real estate and her husband had none; this was the only reason for making the transfer to his wife. I understood from him that he had been sued by some one in Goderich, he said he feared he would be sued about some old claim; I cannot say it was in consequence of this old claim that I advised him to make over his property to his wife. My object in advising William Stanbury to make this transfer was, that he had other creditors, and she had real estate and no creditors; the account was transferred to her name and her notes taken for her husband's liabilities. The husband still manages the business with his wife, but she got most of the goods from us; the husband may have bought some small stuff. I think I assumed the other debts at Mrs. Stanbury's instance; she was willing to give a chattel mortgage on condition that I would protect the other claims; I was anxious to get all the security I could; after I heard of the claim

against William Stanbury, I would not have given him any more goods. After the 20th January, I took notes from Stanbury and his wife; I think they were joint notes; the goods were all charged to Mrs. Stanbury.

WILLIAM STANBURY, identified a statement of goods sold by the sheriff for \$196. These goods were all bought by my wife after she commenced business; the same goods were there when the sheriff seized, as were there when the chattel mortgage was given; never concealed any goods from the sheriff. In consequence of a suit threatened in Goderich I went to see Mr. Watson. I was insolvent when the chattel mortgage was given. There was a judgment against me and against my wife in October. It has not been said my wife gave a mortgage on her real estate before October, 1881; my wife has not paid all her creditors that were creditors in 1881; I assisted in managing the business after my wife took charge of it; I don't know that there was any difference in the management of the business after the business was transferred.

SAMUEL GLASS, (Deputy Sheriff): Three executions were placed in my hands; 1, *Mahon v. Stanbury and Irwin*; 2, *Seymour v. William Stanbury* alone for \$522, issued May 2nd, 1881, and filed in the sheriff's office, May 5th; 3rd, *fi. fa.* in *Irwin v. Stanbury and wife*, for \$148.22, issued November 8th, 1881, filed in sheriff's office same day. We levied on the two first *fi. fas.* almost immediately after getting them. When the third execution was placed in our hands, we went on and sold. The executions were all in our hands to be executed in the usual way; I think when the second execution was put in our hands, we went and seized. We did not interfere with the business, although we knew it was a retail store.

The entry of the learned Judge was shortly:

"Upon the above evidence I find a verdict for defendant, without costs."

The appeal came on to be heard on the 7th February, 1883. (\*)

*Gibbons*, for the respondent. The evidence establishes distinctly that the goods in question were purchased by Sarah Stanbury in her own name and on her own credit and that the plaintiffs would not have trusted William Stanbury; and that it was only by pressure that the plaintiffs obtained security before any execution against Sarah Stanbury. It is also shewn that for months after the execution was in the sheriff's hands against William Stanbury

(\*) *Present*.—SPRAGGE, C.J.O., BURTON, and PATTERSON, JJ. A.

his wife remained in possession buying goods from the plaintiffs and others, and the sheriff was estopped from denying her title as against the plaintiffs. Besides it was shewn that the plaintiffs advanced more than the value of the goods in cash at the time the chattel mortgage was given.

*MacBeth*, for the respondent, insisted that the facts appearing on the evidence were sufficient to stamp the whole transaction as a device whereby to deprive the creditors of William Stanbury of their power to enforce payment of their demands, and clearly warranted the finding the learned Judge had made.

June 29th, 1883, BURTON, J. A.—I can discover no ground for interfering with the decision of the learned Judge. The case comes within the very words of the statute. (a)

Assuming the transfer to the wife to be altogether free from suspicion or objection, which in my opinion it is not, she was well aware, as was the plaintiff, that she was in insolvent circumstances on the 31st October, when the chattel mortgage was given.

It was executed to give the plaintiff a preference, and I fail to see how her making it a condition that two others of her creditors should be also preferred, alters the case or can make a transaction valid which would be otherwise invalid.

At the time the mortgage was given the debtor and her husband had heard that a Chancery suit had been decided adversely to them, and that an execution could, as it did a few days afterwards, issue for the costs.

The whole transaction has a very suspicious appearance. When the husband was the debtor this Chancery suit was instituted. Upon the suit being threatened he consulted Mr. Watson, and the result of that interview was that the assets of the business, and the business itself, were transferred to the wife, although the husband still continued in the active management of it, and bought some few things.

(a) R. S. O., ch. 118.

Mr. Watson naively admits that his object in advising William Stanbury to make the transfer was, that he had other creditors, and she had real estate and no creditors; he adds, that he assumed the other debts at Mrs. Stanbury's instance. "She was willing to give a chattel mortgage on condition that I would protect the other claims."

So that she was willing to make a mortgage which would necessarily have the effect of defeating the other creditors, and of giving a preference to the plaintiff, provided he would consent that two other creditors should be placed in the same position. That is what the transaction was, in plain English. To talk of its being a present advance, is a misapplication [of terms. It may not have been a very profitable investment to the plaintiff; but it may serve to convince him and others that the laws of this portion of the Dominion are not thus easily evaded.

I do not know why the learned Judge refrained from giving costs below, but it is a precedent we shall not follow.

The appeal should be dismissed, with costs.

SPRAGGE, C. J. O., and PATTERSON, J. A., concurred.

*Appeal dismissed, with costs.*

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## MONKHOUSE V. THE GRAND TRUNK RAILWAY COMPANY.

*Railway company—Accident to employé—Railway Accidents' Act, 1881—  
Dominion railway—Constitutional law.*

The plaintiff, a workman employed by the Grand Trunk Railway Company, was injured while in discharge of his duties, by reason of his foot having been caught in one of the frogs of the rails which was not packed in the manner prescribed by 44 Vict. ch. 22 (O).

*Held*, that the Grand Trunk Railway being a Dominion Railway, and within sect. 92, No. 10 (a) of the B. N. A. was not affected by the statute which professed only to apply to railway companies in respect of which the Provincial Legislature had authority to enact such provisions; and therefore, that the defendants were not liable.

THIS was an appeal by the defendants from the judgment pronounced at the trial by Osler, J., directing a verdict to be entered for the plaintiff for \$1,400, with costs of suit.

The action was brought by the next friend of the plaintiff, who was a minor, an *employé* of the company, alleging that the plaintiff,

“Being a railway servant on, &c., within this province, to wit, &c., personal injury was caused to him whilst in the employment of the defendants, a railway company, owned and operated by them in this province, by reason of the space between the rails in a railway frog forming part of such railway, extending from the point of such frog backward to where the heads of such rails are not less than five inches apart, not being at all times after the lapse of three months from the passing of ‘The Railway Accidents Act,’ 1881, 44 Vic. ch. 22 (O.)” and particularly on the date hereinbefore specified, filled in with packing; and that the default occasioning the personal injury hereinbefore stated arose from the negligence of the defendants whose servant the plaintiff then was, and was not occasioned by the plaintiff’s own act, omission or negligence.” [Claiming \$3,000 damages.]

The defendants, amongst other grounds of defence, set up that—

“They are a corporation created by the Legislature of the United Province of Canada before the passing of the British North America Act, and that their railway extends through two or more provinces of the Dominion of Canada, and that they are under and subject in all respects and in all matters relating to their railway to the jurisdiction and authority of the

Dominion Legislature, and not to the jurisdiction or authority of the Legislature of the Province of Ontario, and that the said Act in the statement of claim mentioned was, as therein mentioned, passed by the said Legislature of the Province of Ontario, and not the Parliament of the Dominion of Canada, and that the Act only purports to apply to every railway and railway company, in respect of which the Legislature of Ontario has authority to enact such provisions respectively and the defendants say that for the reasons above stated the Legislature of Ontario has, and had, when said Act was passed, no authority to enact such provisions respecting the railway of the defendants as in said Act contained, and as are mentioned in said statement of claim, and the defendants say the said Act does not and was not intended to apply to them or their railway.

"That the plaintiff had been some time in the defendants' employment and knew the description of the frogs used by them, and knowing the facts and the dangers attending the employment he knowingly took the risk thereof."

They also alleged that they had in their employ competent and skilful men whose duty it was to have used the proper means of protection in the Act mentioned, and that if the plaintiff was injured it was by the neglect of his fellow-servants, and not through any default of the defendants.

The case came on for trial at the Toronto Winter Assizes, 1882, without a jury, when evidence was given clearly establishing the fact of the injury sustained by the plaintiff, and that he was still unable to work, and would continue to be so for some time.

The medical gentleman who had attended the plaintiff on his sustaining the injury, in answer to a question: "Can you form any idea when he will be able to resume active work"? Answered, "No. He is at present unable. It would be more difficult to form an opinion as to that than it was a short time ago."

The learned Judge at the conclusion of the evidence made the following note or memorandum of his findings:

"I find an Act of the Legislature of Ontario by which the defendants are directed to pack the frogs, and the accident has occurred entirely by reason of the defendants' wilful disregard of this direction. The defendants do not propose to accept my decision as final; and therefore, although my impression is, that the Act in question is *ultra vires*, I shall, for the purposes of the trial, and the Judicature Act to the contrary

notwithstanding, treat the Act as in force. The damages I assess at 1,400; and I direct judgment for the plaintiff for that sum, with costs of suit, to be entered after the next sittings of the Court of Appeal."

The appeal came on to be heard on the 23rd of January, 1883.\*

*Bethune*, Q.C., for the appeal.

*Mulock*, contra.

The grounds of appeal shortly were, that the defendants' company were not subject to the provisions of the Act of the Ontario Legislature in question: that the Act itself was *ultra vires*.

October 6, 1883. SPRAGGE, C. J. O.—This case lies within a very narrow compass. The short question is, whether the Act of the Legislature of Ontario, under which this action is brought, applies to the Grand Trunk Railway Co. The question assumes this shape because the Act itself, in terms, applies only "to every railway and railway company in respect of which the Legislature of Ontario has authority to enact such provisions;" and the inquiry is, whether the Provincial Legislature had authority to apply the provision of the Act under which the action is brought to the defendants. The solution of the question lies in the interpretation proper to be put upon sections 91 and 92 of the British North America Act.

These sections have been so much considered, as well in the Privy Council as in the Supreme Court and the Courts of this and other provinces of the Dominion, that it would be superfluous to examine any portions of them except those which bear directly upon the point in question. It will be convenient, adopting the principle of construction pointed out in *Russell v. The Queen*, L.R. 7 App. Ca. at p. 836, as the proper one, to take the first question to be determined to be, whether the Act, if applied to the defendants' com-

\**Present*.—SPRAGGE, C.J.O., HAGARTY, C.J., BURTON, J.A., and PATTERSON, J.A.



pany, falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the Provinces.

It would be a nice question whether it does not fall within the subject of "civil rights in the Provinces," if the question rested there—if the subject dealt with by the Provincial Act be not, if applied to the defendants' company, assigned by the British North America Act to the Dominion Parliament.

The first part of the Imperial Act to be referred to is No. 10, with its exceptions, in section 92. No. 10 assigns to the legislation of the Provincial Legislatures, "local works and undertakings," other than those of three classes which are excepted. The first of these excepted classes is, "(a) lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province." It is indisputable that the Grand Trunk Railway of Canada falls within this excepted class.

Turning then to the introductory part of section 91 we find it enacted that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say." Then follows the enumeration of subjects twenty-nine in all, and the last of these, No. 29, is, "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces."

It appears to me that the excepted class (a) is by number twenty-nine of section ninety-one, as distinctly assigned to the exclusive legislation of the Parliament of Canada, as are "the regulation of trade and commerce, the postal service" or any other of the classes of subjects enumerated in section 91. The only other question, if it admits of question, is whether the Provincial Act under which this action is brought would be, if applied to the defendants' company, in contravention of the legislative authority

assigned to the Parliament of Canada. There is no room to contend that the legislative authority is concurrent, for the language of the Act is "*exclusive* legislative authority." A fair test of the legislative authority of the Provinces would be to try it by an Act applied in terms to the defendants' company. Take the title to this Act and its recital, *mutatis mutandis*, it would read thus: "An Act to make provision for the safety of the employees of the Grand Trunk Railway Company of Canada and the public." "Whereas, frequent accidents to railway servants and others are occasioned by the neglect of the Grand Trunk Railway Company to provide a fair and reasonable measure of protection against their occurrence." Take this, followed by such enactments in relation to the Grand Trunk Railway as are contained in this Act, it would be palpably legislation in relation to a matter, in relation to which legislative authority is assigned *exclusively* to the Parliament of Canada.

I agree in much of the ingenious argument that has been addressed to us by Mr. Mulock; but, as he bases the plaintiff's case upon provincial legislation, and I apprehend necessarily so bases it, he being a servant of the defendants' company, it must, for the reasons that I have given in my judgment, fail.

The appeal should, in my opinion, be allowed. If the learned Judge whose judgment is appealed from had given a judgment in accordance with his individual opinion, it would, in my opinion, have been proper to affirm it.

BURTON, J. A.—I agree in thinking that the Ontario Act was intended to apply to those railways only which, under subsection 10 of section 92, are placed under their jurisdiction, viz.: those lying wholly within the Province, and not declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. That being so, the point which was mainly argued before us does not necessarily

arise for adjudication, and I abstain from offering any opinion upon it.

On the short ground I have mentioned I think the appeal should be allowed, with costs.

PATTERSON, J. A.—I have only a few words to add to what has been said by his Lordship the Chief Justice, because I agree with him and the other members of the Court that the appeal must be allowed.

The statute in question, 44 Vict. ch. 22, has been spoken of as *ultra vires* of the Ontario Legislature. Whether it is so or not depends upon the interpretation which is put upon it. It professes, in section 2, to apply its provisions to "every railway and railway company in respect of which the Legislature of Ontario has authority to enact such provisions respectively."

Reading this literally, no question of *vires* can arise. Neither can such a question be reasonably suggested if the enactment is understood to relate to those railways only to which the legislative authority of the Province is restricted by the exception contained in the 10th article of section 92 of the British North America Act, coupled with the 29th article of section 91. But if it can be taken to contemplate all railways in the Province, it may well be asked if jurisdiction to pass the Act existed.

I do not see that the Act can be properly read except in one of two ways: either as intended to govern all railways in the Province, or as confined to those which are not covered by the exception in article 10. To attempt to construe it more literally would, in my judgment, be to treat it as so uncertain as to destroy its value as a piece of practical legislation. Violation of its mandates or prohibitions would be punishable by indictment; and it cannot be assumed that the Legislature intended to throw upon any company the task and the risk of deciding whether it was, or was not, aimed at as one with respect to which there was authority to enact all or any one of the provisions of the Act. There must be some criterion, capable of being

precisely stated, which the Legislature must be supposed to have had in view. The language employed in the second section shews that all railways were not aimed at, while the limited class is not indicated in any other way than by the general reference to the legislative jurisdiction. I think the only way to give a practical construction to this is, to understand it as referring to the terms of the British North America Act, and thus as intended to affect only those railways over which the Legislature, under the 10th article of section 92, had exclusive jurisdiction, because situated wholly within the Province, and not declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

I wish to guard myself from being understood to hold that a railway company incorporated under the laws of the Dominion, or coming within the exceptions in the 10th article, may not be affected by provincial legislation touching property and civil rights, or other subjects within the jurisdiction of the Provincial Legislatures. I merely hold that this statute, which relates to the management and in some respects to the construction of railways, and deals only with railways as such, applies only to a class which does not include the company which is defendant in this action.

HAGARTY, C. J., concurred.

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## HOWES V. THE DOMINION FIRE AND MARINE INSURANCE COMPANY.

*Fire insurance—Change in the character of risk—Mortgagor and mortgagee—Subrogation.*

The plaintiff having created a mortgage in favour of a loan company, whereby he covenanted to insure the buildings on the property, failed to insure, but assented to an insurance effected by the company in their own name, and repaid them the premium. The premises insured were described as a "two story house, shingle roofed building \* \* owned and occupied \* \* as a steam bending factory." The property having been destroyed by fire, the insurance company paid to the loan company the amount due to them, and took an assignment of their mortgage, whereupon the plaintiff instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due on the mortgage after crediting the amount of insurance. It was shewn that the premises, instead of being used as a steam bending factory, had been converted into a door and sash factory; of which change no notice had been given to the insurance company.

*Held*, reversing the judgment of the Court below, that the special survey set out below, in which the intention to use the premises as a factory was mentioned did not form part of the application or policy and could not be construed as an assent by the defendants to such occupation: that the statutory condition as to change of occupation or use of the buildings without notice to the insurance company had therefore been broken, thus invalidating the policy; and that the plaintiff was not entitled to any benefit thereunder.

*Held*, also, that the insurance company were at liberty to set up this defence, though between them and the mortgagees the policy was, by a subrogation clause therein made unconditional.

THIS was an appeal by the defendants from the judgment of Proudfoot, J., pronounced on the 22nd of June, 1882, whereby it was adjudged that the plaintiff was entitled to be credited with \$1,000, the amount of the policy of insurance in the pleadings mentioned, and to redeem the property in question upon payment to the defendants of the balance found due them after applying that sum as a payment on the mortgage.

The other facts giving rise to the action are fully stated in the report of the case 2 O. R. 89, and in the present judgment.

The appeal came on to be heard on the 5th of September, 1883.\*

\* *Present*—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

*E. Martin*, Q. C., for the appellants, contended that the interest of the plaintiff was not insured, nor was the plaintiff entitled to the benefit of the insurance.; the interest of the Royal Standard Loan Company, as mortgagees, having been the only interest that was covered by the insurance that had been effected. The learned Judge in his judgment sets out the wording of exhibit "B,"—the special survey—(a) as also that of the application by Mr. Burnett, "C," and treats the policy and "B" as forming the contract. But exhibit "B" was obtained merely for the information of the company, and in no sense formed part of the policy as is stated in the judgment appealed from, and that judgment was based on the ground that the plaintiff was not suing on or in respect of the policy. If so the plaintiff could not claim credit for the \$1,000; but if he sued on or claimed in respect of the policy, then it covered only the interest of the Royal Standard Loan Company as mortgagees, and the subrogation clause was an essential part of the policy, and these documents must be construed according to their actual terms. No case was made for reforming the policy, and the subrogation clause could not be rejected to the prejudice of the appellants.

He also contended that the appellants only insured the Royal Standard Loan Co. as mortgagees, and were entitled to an assignment of the mortgage if they paid the loss, but they incurred no liability to pay the loss, claiming that the policy was avoided by reason of the unauthorized increase of risk in the occupation of the premises; and therefore claimed the right, under the terms of the unconditional subrogation clause attached to the policy (b), to take an assignment of the Loan Company's mortgage on the footing that the policy was void. This right the Loan Company recognized, and expressly covenanted with the appellants that the whole sum secured by the mortgage was unpaid; and it was the intention on the part both of the Loan Company and the appellants that nothing should be paid or

(a) 2 O. R., p. 91.

(b) 2 O. R. 96.

credited, and in fact nothing was paid or credited, in respect of any loss under the policy. However, if Howes could be treated as insured under the policy, then the evidence established a change of occupation so as to increase the risk within the control or knowledge of the plaintiff, without previous written notice, contrary to the third statutory condition. The policy, as originally issued, described the insured premises as "The two-story, frame, shingle-roofed building, 30 x 60. owned and occupied by Abraham Efner, as a steam Bending Factory, situate on north side of York street, village of London East."

The only notice of change in occupation was that given on the 8th August, 1881, which was as follows: "This property is sold to W. J. L. Howes, and used to store doors and sashes." The effect of this notice was to restrict the use of the building to the purpose of storing doors and sashes, or any purpose not more hazardous; and no subsequent change could be made without the consent of the appellants. Here it has been found as a fact that the change in occupation increased the risk beyond that of a Bending Factory; but that under the special survey the premises could be used as a sash factory. This finding was in part based on the erroneous assumption that the letter of 20th June, 1879, in which Mr. Despard objects to the possible change of occupation (a), had not been received in evidence; but it was proved that the special survey was obtained exclusively for the information of the appellants, and was not given by or on behalf of the plaintiff; and that at most exhibit "B" stated a mere intention to use the premises as a sash factory, which might or might not be carried out, and formed no part of the contract; but, in any event, the letter of 8th August, 1879, shewed this intention was finally abandoned, and that the premises were only to be used to store doors and sashes.

*W. Cassels*, Q. C., for the respondent, insisted that the

evidence sufficiently established that the insurance in question was effected on behalf of and at the expense of the plaintiff: that it was immaterial whether this was known to the insurance company or not, but if of any importance, the evidence shewed that the insurance company were aware that it was effected on behalf of and at the expense of the mortgagor. He also contended that upon payment of the insurance moneys the mortgage became reduced by the amount of such payment, and when assigned to the defendants could not have been enforced except for the balance, after crediting these moneys; and that the defendants accepted the assignment subject to all equities: that the subrogation clause referred to was not under seal, and was not a part of the policy, and was not binding on the plaintiff; and that even if the defendants were entitled to set up a breach of the condition as relied on, the evidence did not entitle the defendants to succeed. In fact sufficient was shewn to warrant the Court in determining that the defendants authorized the use of the premises in question as a sash factory.

In addition to the cases mentioned in the Court below, *May on Insurance*, s. 457: *Shotwell v. Jefferson Ins. Co.*, 5 Bos. N. Y. 247; *Concord Union Mutual Ins. Co. v. Woodbury*, 45 Maine 447, were referred to.

October 6, 1883. PATTERSON, J. A.—The facts which seem to me essential to be borne in mind are only few, and are clearly shewn by the evidence, setting aside for the moment the question of the change of occupation of the insured premises.

The plaintiff in his mortgage to the Royal Standard Loan Company had covenanted to insure the buildings and assign the policies to the company; and further, that in case the company should pay any premiums on such insurance, the amounts paid should be added to the debt secured by the mortgage.

He did not himself effect an insurance, but he authorized or assented to the manager of the loan company doing so



on his behalf, promising to pay the premium, and in fact afterwards paying it, to the loan company.

The company effected the insurance now in question, but effected it in the name of the company instead of in the name of the plaintiff.

I do not state the details of the evidence as to how the matter happened to get into this shape. The fact is quite clear that, as far as the loan company was concerned, the intention was to effect an insurance for the benefit of the plaintiff as well as of the company, just as it would have been if the plaintiff himself had effected it under the literal terms of his covenant.

The policy insured the Royal Standard Loan Company of London, for the term of one year, for the amount of \$1,000—on the two story frame shingle roofed building, 30 x 60, owned and occupied by Abraham Efner (which was an error, as Howes then owned and occupied it,) as a steam bending factory, situate, &c., \$500 ; on fixed and movable machinery therein \$500, \* \* against all such immediate loss or damage sustained by the assured and their legal representatives, as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from, &c.

The policy did not stop here, for there was a clause indorsed, which was to form part of it, and there were conditions which formed part of it, and it was declared that the application also formed part of it. But without looking for the moment at any of these, suppose there was no more in the policy than what I have quoted from it, we have a mortgagee insuring the property covered by the mortgage, and the insurance company agreeing to pay all such loss or damage sustained by the mortgagee as should occur by fire to the property, not exceeding \$1,000, and not exceeding the interest of the mortgagee in the property; and we have the fact that this insurance was intended for the benefit of the mortgagor as well as for the security of the mortgagee.

Now that a mortgagee may insure in this manner, and enforce the policy to the extent of the amount insured, if a loss to that amount has occurred to the property insured, even though the mortgage debt may be of smaller amount, is settled by authority.

To the extent of the debt the mortgagee has a beneficial interest in himself. The excess above that amount he receives on behalf of the mortgagor ; but, as to the whole amount, the insurance is for the benefit and on behalf of the mortgagor, whose debt is paid by it.

In *Reesor v. Provincial Insurance Co.*, 33 U. C. R. 357, this doctrine is stated by Sir Wm. Richards, who refers to the judgment of Sir James Macaulay in *Ogden v. Montreal Assurance Co.*, 3 C. P. 576, where authorities for it are quoted.

Those authorities sustain the proposition.

In one of them, *Irving v. Richardson*, 2 B. & Ald. 193, a mortgagee of a ship whose interest was only £900 had insured the ship for £3,700. In a contest with the underwriters as to what he was entitled to receive, Lord Tenterden left it to the jury to say whether the insurance effected by the mortgagee was intended to cover his own interest only as mortgagee, or that of the mortgagor also. This direction was held to be proper. No question as to its propriety could have arisen if the mortgage had been one on land in which the legal estate passes out of the mortgagor. It was raised on the effect of the Act respecting the Registration of Ships (6 Geo. IV., ch. 110, sec. 45) under which the mortgagor did not cease to be owner.

The distinction between an insurance by a mortgagee of his interest as mortgagee, and an insurance of *the property* by the mortgagee, as in this policy, is accurately pointed out by the learned Judge in the Court below.

I may be permitted, however, to add, as the latest statement of the law which I have seen, a short passage from the judgment of Bowen, L. J., in *Castellain v. Preston*, 11 Q. B. D., at p. 398 : " There are persons," the Lord Justice said, " who have a limited interest, and yet who insure for

more than a limited interest, who insure for the total value of the subject matter. There is the case, which I suppose is the most common, of carriers and wharfingers, and commercial agents, who have an interest in the adventure. It is well known what their rights are. Then, to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value; but even supposing he is not entitled to the legal ownership, he is entitled to insure *prima facie* for all. If he intends to cover only his mortgage, and is only insuring his own interest, he can only, in the event of a loss, hold the amount to which he has been damnified. If he has intended to cover other persons besides himself, he can hold the surplus for those for whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest."

It cannot be, and is not, denied that the insurance company knew that the loan company held a mortgage from the plaintiff upon the insured premises.

That knowledge, though not a material fact, appears in the application papers, and it forms the reason for the added clause to which I have alluded. That clause I regard, as it was regarded in the Court below, as an express recognition of the fact that the mortgagor was interested in the policy. It is framed to suit the case of a policy effected by a mortgagor, and assigned, or with the loss made payable, to the mortgagee, rather than with a view to a policy in this form; but in attaching it to this policy the understanding was evinced that the effect of the insurance in this case was the same as in the other.

What it does is, in the first place, to waive certain conditions in favor of the mortgagee, and to the extent of his interest only; those conditions remaining, of course, effective as against the mortgagor; the next provision is, that whenever the company shall pay any loss to the mort-

gagee, and shall claim that as to the mortgagor or owner no liability therefor existed—in other words, when the waiver has been acted on in favor of the mortgagee but the condition is to be insisted on as against the mortgagor—a subrogation shall take place. But it is stipulated, such subrogation shall be in subordination to the claim of the mortgagee for the balance of the debt, or the company may pay the whole debt and take an assignment.

This last position is the one adopted in this case. What does it amount to? The interest of the mortgagor in the policy is distinctly recognized; but the insurance company, reserving its right to insist, as against him, that the policy is forfeited for breach of a condition, saves the mortgagee harmless, and undertakes to contest the mortgagor's right to payment—but that is his right as a party to the policy, not as one with whom there is no contract.

Thus the effect of the indorsed subrogation clause is to vary the position which would have obtained without it only by the waiver of the conditions, and by the mortgagee's agreement, in consideration of that waiver, to give the insurance company an equivalent by the assignment of part or all of the debt and the security.

In this view of the case the question of subrogation does not arise for discussion, and the further consideration of the matters in contest must take the same course as in the Court below, by our undertaking the inquiry whether the plaintiff, if he were bringing an action on the policy, either in his own name or in the name of the loan company, could be successfully resisted by the insurance company on the ground that he had broken the condition touching change of occupation of the insured premises.

The fact is that the plaintiff's tenant, one Holyoke, used the building for some months before the fire as a sash factory, making in it sash and doors, and door frames.

The defendants contend that this was a more hazardous occupation than that of a bending factory, which they say was the standard of hazard to which the policy referred. In connection with the sash making business Holyoke had

a circular rip saw worked by steam, and part of his business was to rip lumber for customers as well as for the purposes of his sash making.

The learned Judge in the Court below held, properly as we think, that the use of the rip saw and the making of doors and door frames was not an increase of the risk which attended the business of sash making; and he also held that sash making involved greater hazard than the business of wood bending, in which we also agree. But he construed the evidence before him as shewing that sash making was an occupation of the building consented to by the insurance company when the policy was made, and that therefore no increase of hazard had taken place. We have to see whether we can take the same view of the evidence.

The policy is dated 14th July, 1879. The fire occurred on 7th June, 1880.

The policy describes the insured building as "owned and occupied by Abraham Efner as a steam bending factory." This description was not correct at the date of the policy. The way the error came to be made seems apparent from what is to be gathered from the evidence. Efner had owned and occupied as described, but he had sold to the plaintiff, and when he sold he had handed over to the plaintiff, or the loan company had retained for the plaintiff's benefit, a policy in the Commercial Union Insurance Company. When that policy expired, the loan company's manager, being requested by the plaintiff to renew the insurance for him, handed the Commercial Union policy to Mr. Burnet, the agent of the defendants, asking him to effect the insurance in his company. Thereupon Mr. Burnet, assuming to act for the loan company, filled out a form of application for insurance, and signed it "Royal Standard, per J. B.," and forwarded it to the head office of his company. He headed that document "Efner property," and described the property in it as it was afterwards described in the policy, doubtless following the description which he found in the old Commercial Union policy.

If that were all that occurred, there would be no room to contend that the risk was taken as of a class more hazardous than a steam bending factory, which would itself be classed as a special hazard. But something more did take place, and upon that the question arises.

Upon receiving the application, the manager of the insurance company wrote to the agent, Mr. Burnet, for a special survey, and this Mr. Burnet furnished. It is a document a good deal in the form of an application paper with printed questions and written answers, some of them framed as if addressed to and answered by the applicant for insurance. It bears no signature. The material parts of it are two answers in these words :

"Has been used till now as a bending factory by the former proprietor Mr. Efner, now owned by W. J. L. Howes, and rented by him to George Holyoke, intended to be used by him as a sash factory."

"Rented by George Holyoke. At present not at work."

Then there are two letters which may not in strictness be evidence between the present litigants, because they are merely communications between the manager and the agent of the insurance company ; but they are evidence of the same kind as some of the oral evidence which was given, and serve to shew how the matter was regarded at the time by those who acted for the company. Their understanding could not, of course, be admitted to control the operation or construction of the instruments by which the rights of the parties have to be tested, but they may serve to shew whether or not the present contention was an after-thought, and so not entitled to be indulgently dealt with.

One is, Mr. Burnett's letter of 19th June, 1879, which accompanied his special survey. Referring to that document it said : "I send you application for 23rd by book post. Premises unoccupied at present ; as soon as occupied will let you know for what purpose. Will take you to see it when you come up."

And the other is, the manager's reply. It reads thus :

HAMILTON, 20th June, '79.

J. BURNETT, Esq., London,

Dear Sir,—Your letter of 19th and special survey x23 received. With reference to this risk I must say it does not look very prepossessing. We could not hold it if it is to be turned into a sash factory, as we do not write this class of risks. In fact I should prefer it if you could place it elsewhere. If you cannot we will accept it, as the Royal Standard have given us business, and I suppose will give us more. In any case, if occupied as sash factory, it will have to pay 7 per cent. We hold it in the meantime while unoccupied, at the rate sent, 3½. Let me know if you place it in any other Co.

The policy was not issued for three weeks after this date. The premium, \$35, was at 3½ per cent.

The learned Judge decided that the building was insured as a sash factory, because the special survey, which he seems to have treated as the *application*, which by the terms of the policy is part of the policy, contained the intimation that Holyoke intended to use the building as a sash factory.

But in the first place the information was not contained in what was called the application. It was something communicated by the agent of the insurance company to the manager in response to his request for a special survey. The same document mentions the building or the tenant as not then at work; there is nothing in evidence to shew that the agent learned either from the plaintiff or from the loan company, or from Holyoke, that the intention was as stated, nor is it shewn where the information came from; and as far as the evidence of the plaintiff himself and that of Mr. Atwood the former manager of the loan company would indicate, the information was incorrect, at all events if it assumed any immediate intention of beginning the sash making business; and this is borne out by the fact that the business was not begun for half a year later, or thereabouts.

When therefore the policy described the hazard as that of a steam bending factory, which literally followed the application, properly so called, we are not able to satisfy ourselves either that the agent's statement in the special survey can fairly be imported into the contract, or that if so imported it could properly be taken as applying the

policy, as a present insurance, to a risk of the class of a sash factory. Upon this last point there may be room for question, but upon the former we find the difficulty of reading the reference to the sash factory as part of the contract insuperable.

Then referring to the letters of 19th and 20th June, it appears to us that the manager of the insurance company understood the position just as it strikes us now in construing the documents. He says in effect: "We will not insure a sash factory if we can avoid it, and certainly not for less than seven per cent. In the meantime we will insure the building in its present condition, as a bending factory, for half that rate of premium. If the hazard is increased by changing the occupation by the introduction of sash making, our condition requires that a new arrangement shall be made with us, or the policy will be void. We shall then require the higher premium as the price of our consent, but it will be time enough to deal with that when the change of occupation is decided upon."

Early in August, 1879, Holyoke, who was agent for some manufacturers of or dealers in doors and sashes, used the building for storing goods of that kind; and the insurance company received formal notice of that change of occupation, and assented to it. At that time the manufacture of doors and sashes by the tenant had not been begun. We gather from the evidence that it was commenced later as a winter occupation by the tenant, and it is not pretended that any notice of it was given to the defendants.

Differing therefore, as we do from the learned Judge in the Court below as to the effect of the policy—our difference arising from the view we take of the special survey as not being part of the application, as well as with regard to the reading of the reference to the intended occupation of the building—the consequence is that we find that the condition in question was broken, and that the plaintiff cannot maintain his claim to the insurance money.

The appeal is therefore allowed, with costs.

SPRAGGE, C.J.O., BURTON and MORRISON, JJ.A., concurred.



## FLEMING V. MCNABB.

*Land tax—Sale for taxes—Invalid sale by reason of improper assessment—Principal and agent—Agent buying.*

The assessment of four lots, containing about 400 acres in the name of the plaintiff embraced seven acres already sold and separately assessed, of which fact the assessor was aware. The defendant purchased at a sale for taxes, and the plaintiff instituted proceedings impeaching the sale within two years thereafter.

*Held*, affirming the judgment of the Court below, that the assessment was illegal and vitiated the sale.

The defendant had for some years acted for the plaintiff in looking after his lands, and paying the taxes; but in 1874, they had some difficulty, and from that time the plaintiff ceased to correspond with the defendant, and employed one H. to pay the taxes, and look after the property.

H., without any instructions from the plaintiff, on one occasion wrote to the defendant requesting him to ascertain the amount of the taxes, and to draw upon him therefor, with which request the defendant complied, but nothing further occurred to change the relative position of the parties before the sale:

*Held, per* BURTON, J. A.—That under these circumstances the confidential relations which had previously existed must be held to have ceased, and that the defendant was not precluded from purchasing at the sale for taxes.

*Per* PROUDFOOT, J.—That what took place could not have the effect of determining the fiduciary relationship between them, and therefore the defendant could not purchase the plaintiff's land to his prejudice.

THIS was an appeal from a decree of the Court of Chancery pronounced by Spragge, C., setting aside a sale for taxes of certain lands of the plaintiff, and directing the deed thereof to be delivered up to be cancelled.

The suit was instituted by Sandford Fleming against John M. McNabb and Alexander McNabb, the bill in which was filed 22nd October, 1880, and set forth that plaintiff being the owner of 400 acres in the township of Saugeen, leased the same to one Henry Harmer, who, in addition to the rent agreed upon, covenanted to pay the taxes on the lands, and which he took possession of and worked as a farmer, prior to which time the defendant Alexander McNabb, residing near the lands, acted as the agent of plaintiff in looking after the lands and paying the taxes thereon on behalf of the plaintiff: that the plaintiff relying on the fact that Harmer was in occupation, and trusting to McNabb

protecting the plaintiff's interests therein, neglected to see to the payment of the taxes by, reason of which the lands were, on the 17th December, 1878, sold by the treasurer for arrears of taxes, and the same were bid in by one William A. McLean, as agent for and under instructions from McNabb; which lands were worth from \$8,000 to \$10,000, while the taxes amounted only to about \$220, and a small portion of such land would have sufficed to pay the taxes thereon; and that persons attending such sale would have bid against the said McLean had it not been that they believed that McLean was bidding for the lands in the interest of the plaintiff.

The bill further stated that in 1876, part of the said lands had been sold and conveyed to the Wellington, Grey, and Bruce Railway Company: that they or their lessees had been in possession of such portion of the lands ever since; had been assessed therefor and paid taxes on the same, and that the amount charged as arrears of taxes for which said lands of the plaintiff were sold was in excess of the amount properly due, and that the sale was for that and other reasons improperly and illegally made; and amongst others that there was during all the years such arrears of taxes were charged for, sufficient distress on the lands to satisfy all taxes properly chargeable thereon, which was well known to the defendants and to the collector of the township, who were also aware that during all this time the lands were occupied by Harmer, the lessee above named.

The bill further alleged that after the sale it was arranged between Alexander McNabb and his son, the defendant John M. McNabb, that the deed from the Warden and Treasurer of the township in pursuance of such tax sale should be taken out in the name of the said John M. McNabb, and the same was accordingly issued to the said John M. McNabb.

The prayer of the bill was that the sale might be declared illegal and void, and the deed so issued to the defendant John M. McNabb, delivered up to be cancelled: or, if the

sale were upheld, that the said John M. McNabb might be declared a trustee for the plaintiff, and ordered to convey to him.

The defendants answered the bill. The defendant John M. McNabb, stating that the lands were conveyed to him as trustee for his father.

The defendant Alexander McNabb by his answer denied any agency for the plaintiff, admitted the sale and purchase by McLean as alleged in the bill, but denied anything illegal or improper in the proceedings for the assessment or sale of the lands.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Walkerton, in April, 1881. The effect of the evidence then given sufficiently appears in the judgment.

At the conclusion of the case the Chancellor remarked to the effect following:

"The case has been very fully and ably argued, and probably before the final disposition of it, I may desire to examine further into the case of *Ley v. Wright*, 27 C. P. 522, though perhaps there is sufficient for its disposal independently of that. I see no reason to alter the view that I expressed at the commencement of the case. Mr. Story says that Courts of Equity do not interfere on the ground that a transaction is against good morals, or such as a man of honour would not enter into.

"If Courts of Equity did interfere in cases of that kind, this would be a very plain and palpable case for interfering. I don't know that any case has ever been before me in which there has been a more flagrant dereliction from what I should call fair and honest dealing between men. This man Alexander McNabb had been acting for the plaintiff, and had been in communication with him. There had been intercourse between them by letter. There had been acts done in relation to this same property by Alexander McNabb, from time to time. Then this land, as to which he acted as agent to a certain extent, is offered for sale, and Alexander McNabb stealthily gets some person to bid for him. He had a right to do that of course, if he chose. He got Mr. Maclean innocently to bid for him, giving him very strict directions that on no account his name should be disclosed, that it should be kept secret who it was was the person really bidding; and when he comes to give evidence, he says he can't conceive any reason why he should have done this. Why, the reason is palpable. After what had occurred, and his relations with the owner of the land, it was palpable that he should try to preserve from

the knowledge of every person, especially from the owner of the land, the fact that he behind his back was purchasing this land. But that is not all, nor is it the extreme length to which he afterwards went, for in the summer after he had made the purchase, an agent of the owner of the land comes to him, is driven to his place by the person who was then tenant, and who was ignorant also of the sale, which had then taken place. The agent informs Mr. McNabb that he is about to enter into a new arrangement, that he is going to give Harmer a new lease, that a barn is to be built which will cost \$200; informs him of all this, and forms his plans for the future, and McNabb merely makes an observation not that he was a good tenant, but that he was a very good man. \* \* It is urged, however, and I threw it out myself at the first, that what must be judged here is not the morality and honour of the transaction, as put by Mr. Story in his commentaries, but whether there was a legal duty due from McNabb to the plaintiff; and there I think exists the difficulty. There had been an agency in paying the taxes previously to that, but they were only isolated transactions; as taxes had once or twice become due, they had been paid through the agency of McNabb; McNabb knew therefore that it was the intention of the party to pay from time to time, though the amount was considerable, and he did it merely acting as an agent from time to time.

"I do not think, therefore, any duty was thrown upon McNabb to continue to pay the taxes at that time. I doubt if any agency ever existed at all; I am inclined to think it had not; but at all events, that it was not existing at that time—nay, not only had he discontinued requesting McNabb to pay and to draw upon him for it, and in that way sending the money, but he had appointed another person, Mr. Hall, to act as his agent in lieu of McNabb; so that I suppose upon that point my judgment must be for defendant. \* \*

"With regard to the assessment of this land erroneously as non-resident land, when in fact it was resided upon and was occupied, I suppose that point must be considered as settled, in a case which was followed by me in *Silverthorne v. Campbell*, 24 Gr. 17. It was not originally held by me to that effect, but I followed another case to that effect. If it be right as to the assessment with respect to the Great Western Railway's lands, which appears at the present time to be the turning point in the case, and at all events the principal point, then of course the plaintiff must succeed altogether.

"I will look into the case further, but unless I change my opinion, it is, that this case falls within *Ley v. Wright*, and the decree will be for plaintiff, and I need not say, with costs; and I might add, that if I had found against the plaintiff I would have dismissed the bill, without costs, on account of the unrighteous conduct of the defendant."

Subsequently his Lordship handed out a memorandum to the effect following:

"At the hearing of this case I gave judgment upon the question of agency against the contention of plaintiff. At the same time I stated my impression to be, that upon the question of assessment the case was governed by that of *Ley v. Wright*, 27 C. P. 522. I have since examined these cases more fully, and the result has been to confirm the impression which I then entertained.

"The decree will therefore be for the plaintiff, with costs. The defendants might strictly set off against the costs only the taxes paid by them which are properly referable to the land owned by the plaintiff, as distinguished from that owned by the Great Western Railway Company. That would be the exact sum to be given by the plaintiff to the defendants, and for the excess the defendants would properly have their remedy over against the municipality, but the plaintiff has not made the municipality a party defendant, for the purpose of that remedy over, and therefore the proper decree will be, that the taxes paid by the defendants, and the costs payable by them to the plaintiff be set the one against the other; the difference to be paid by the plaintiff or the defendants, according to which of the two amounts may exceed the other."

The appeal came on to be heard on the 17th January, 1883.\*

*Robinson*, Q. C., and *O'Connor*, for the appellants.  
*S. H. Blake*, Q.C., and *Hall*, for the respondents.

*McKay v. Chrysler*, 3 S. C. 436; *Hamilton v. Eggleton*, 22 C. P. 536; *Cotter v. Sutherland*, 18 C. P. 357; *Irwin v. Harrington*, 12 Gr. 179; *Horse v. Merriman*, 2 Greenl. 375; *Doe Upper v. Edwards*, 5 U. C. R. 594; *Yokham v. Hall*, 15 Gr. 335; *Street v. Fogul*, 32 U. C. R. 119; *Allan v. Fisher*, 13 C. P. 63; *Fenton v. McWain*, 41 U. C. R. 239; *Edinburgh Life Ass. Co. v. Ferguson*, 34 U. C. R. 253; *Oldhams v. Jones*, 5 B. Muroe, 458, were referred to.

June 29th, 1883. BURTON, J. A.—The counsel for the respondent contended that the sale of the land in question could not stand owing to the fiduciary relationship which existed between the elder McNabb and his client, and that the former could only become a purchaser of the premises in question for the respondent. I quite agree with the

\**Present*.—HAGARTY, C.J., Q.B., BURTON and PATTERSON, JJ.A., and PROUDFOOT, J.

remarks quoted by the learned counsel, that no part of the jurisdiction of the Court is more useful, or should be more freely applied, either as regards the persons or the circumstances in which it is applied, than that which it exercises in watching and controlling transactions of this character, and of correcting abuses of confidence; and I apprehend that it will be extended to cases where the only relation between the parties is of a mere friendly character if habitual reliance on advice and assistance be shewn, accompanied with partial employment in some sort of business; but we must be careful that we do not, from a feeling that a particular transaction is discreditable or unconscientious, strain the doctrine beyond its proper limits, and we should be clear that the party whose act is impugned did stand in that confidential relationship to the plaintiff, or that he made an improper use of information which he acquired whilst that relationship existed, otherwise the enforcement of the principle would be intolerable and repugnant to the feelings and practice of mankind in the conduct of the ordinary affairs of life.

Upon a very careful consideration of the evidence I think the conclusion of the learned Chancellor upon this part of the case was the correct one.

It would seem that originally two only of the lots in question were owned by Sandford Fleming, the plaintiff; the other two being owned by his brother David Fleming, who was compelled to give them and other property to the bank, and that the plaintiff having come to his assistance some time in 1874, paid off the debt to the bank and took a transfer of their securities, including the lots in question. The exact date of this transaction does not appear, but the patent for these lands issued to the plaintiff on the 8th October, 1874.

The defendant Alexander McNabb, apparently acted as agent for both the plaintiff and his brother previously to this time, but in 1874 a difference arose between McNabb and the plaintiff, the former apparently feeling aggrieved because the plaintiff declined to relieve him from the

losses he had suffered through his brother, and from this time forward I can find no evidence of any direct transactions between them.

There was a correspondence between McNabb and David Fleming in reference to a claim for some hay cut upon David's lots, and a letter from McNabb to him purporting to be dated 11th August, 1875, was relied upon as shewing that the relationship previously existing had not been altered by the differences between McNabb and the plaintiff in the previous year. On sending for the exhibits I find, as I suspected, that this letter was written in August, 1874, before any disagreement had arisen, and that the date in the Appeal Book is erroneous. It was also a claim in which the plaintiff had no interest, being for hay cut upon David's lot before the transfer to the plaintiff.

The correspondence between Hall and McNabb in reference to the taxes so far from shewing that the former relations still subsisted leads, in my opinion, to a directly contrary conclusion. If the plaintiff had considered that the former relations still existed, we should have expected to find him writing directly to McNabb as formerly, or at least desiring Hall to do so. Instead of this, we find him on the 8th May, 1875, writing to Hall, enclosing the tax paper to him, and wishing him to attend to it. Hall writes, it is true, to McNabb to ascertain the amount due, and draw upon him for it, a request with which he complied, and this would seem to be his only action in connection with the land in the interval between the disagreement and his actual purchase.

I am not unmindful of the rule that when a relation of confidence is once established, either some positive act or some complete case of abandonment must in general be shewn, in order to determine it; but there is evidence here from which such an inference can very properly be drawn. We have not the letter from Mr. McNabb to which that of the plaintiff dated 21st October, 1874, is an answer, but it is clear that he supposed, it may be very unreasonably, that he had not been properly treated; and when we find the

plaintiff, shortly afterwards, employing another person to attend to the payment of the taxes which McNabb had previously attended to, and the same person taking upon himself the active management of the property by leasing it to a tenant, the only proper inference I think to be drawn is, that the agency was determined.

If he did not stand in a fiduciary relationship when the act complained of occurred, it appears to me that it would be an unwarrantable refinement of the doctrines of the Court to hold that he obtained any information whilst those relations continued which he has used to the prejudice of the plaintiff. I do not see that he obtained any such information. I should imagine that he did, in point of fact, transmit to the plaintiff the tax papers that were delivered to him, and the subsequent knowledge that the taxes were unpaid and the lands offered for sale was common to every one.

I do not make any allusion to the defendant's conduct in allowing the new lease to be executed to Harmer without making known his own claim; that conduct probably established an equity against himself of which Harmer might profitably have availed himself when the action of ejectment was brought to turn him out of possession, but I do not see that it raised any equity in favour of this plaintiff.

In the case of *Oldhams v. Jones*, referred to, in 5 B. Monroe, 467, the agent continued to be agent up to the time of the sale for taxes, and wilfully and intentionally permitted the land to be sold in order that he might carry out a contract he had made with a person who would otherwise have paid the taxes, and he never claimed the land in opposition to the previous owners, but for their use and benefit.

I am of opinion that upon this point the judgment of the learned Chancellor was correct, and that the only thing open upon this appeal is the validity of the tax title.

We are driven then to consider whether the sale is invalid on other grounds.



The four lots were severally sold on the 17th December, 1878, under a warrant dated the 25th July, 1878, in which the lands to be sold are described as lands in the municipality of Saugeen, lying in Lake Ranges 57, 58, 59, and 60, and were conveyed in one deed to the assignee of the purchaser for taxes alleged to be due thereon up to the 31st December, 1877, by a similar description.

The deed is dated 20th December, 1879; the bill was filed 22nd October, 1880.

The lots in question were assessed against some person as owner or occupant from 1862 down to 1874, inclusive.

In the following year they appear for the first time on the non-resident roll, although they were in fact occupied.

According to the clerk's evidence they appear on the roll for that year, thus :

|         |          |
|---------|----------|
| 57..... | 87 acres |
| 58..... | 100 "    |
| 59..... | 100 "    |
| 60..... | 101 "    |
|         | <hr/>    |
|         | 388      |

In the same year the railway were assessed in respect of portions of the same lots, thus :

|         |           |
|---------|-----------|
| 57..... | .40 acres |
| 58..... | 2.30 "    |
| 59..... | 2.30 "    |
| 60..... | 2.30 "    |
|         | <hr/>     |
|         | 7.30      |

Making a total of 395.30 acres.

The full lots are said to contain the following acreage :

|         |          |
|---------|----------|
| 57..... | 89 acres |
| 58..... | 105 "    |
| 59..... | 104 "    |
| 60..... | 103 "    |
|         | <hr/>    |

In all.....401 acres.

The deduction therefore would not seem to be accurate, but the number of acres assessed are less in quantity than

would have been properly assessable to the plaintiff if these figures are correct.

How then is this assessment to be construed? If as 87 acres of lot 57, and so on through the list would it not be void for uncertainty. The statute provides that if the quantity assessed is a full lot it shall be sufficiently designated as such by its name or number, but if it is part of a lot the part shall be designated in some other way whereby it may be known; if part here was intended it is impossible to say what particular 87 acres were intended. But the assessment is not so to be read. The land is not described as part of the particular lot containing 87 acres, but as of the whole lot. The description would thus be complete, and the number of acres given, though incorrect, does not cut down the previous description; but thus read the assessment embraces some seven acres which had been sold to the Great Western Railway Company, and to whom they were assessed.

In 1876 the lots were assessed (with the exception of 57, which was still described as containing 87 acres) for the full acreage described in the patents, and in 1877 the whole were described according to the description contained in the patents, that is, for the full quantity without any deduction.

The question is, therefore, whether such an assessment of the whole lot, where to the knowledge of the assessor a portion of it has been sold, and is separately assessed, is valid.

The learned Chancellor held that the case was governed by *Ley v. Wright*, reported in 27 C. P. 522, and held the sale invalid.

It is contended, on the other hand, that in *Ley v. Wright* the land improperly included was about half of the land sold, and the sum assessed was accordingly nearly doubled, whereas the excess here is too small to be a sufficient ground for setting aside the sale; and that the defects, if any, have been cured by the statute. Secs. 127, 150, and 155. of the R. S. O. ch. 180.

How then would the matter stand apart from the curing Acts ?

In the case of non-resident lands the assessor has no means generally of knowing whether the lot is owned by one or several proprietors. He assesses in that case the whole lot, and by sec. 118 the treasurer is authorized upon satisfactory proof being adduced to him that the parcel so assessed has been sub-divided to receive the proportionate amount of tax chargeable upon each sub-division, leaving the other sub-divisions chargeable with the remainder.

Here, however, the portions sold became resident land, and was so assessed, and was again included in the assessment of the whole lot as non-resident. How was it possible for the plaintiff to pay the taxes properly payable by him, or to redeem the land when sold without paying the tax assessed in respect of the portion owned by others. We know that in practice a different rule prevails between the taxation of lands owned by residents and non-residents, and that under section 67 a non-resident can obtain relief on appeal only when his lands have been assessed twenty-five per cent. higher than similar lands belonging to residents. I do not see therefore what relief this plaintiff could have obtained had he discovered the error after the sale and before the time for redemption had expired, and that such an assessment and sale could not be upheld previous to the passing of what are known generally as the curing sections of the Assessment Act.

Great differences of opinion have arisen as to what defects are cured by the Act, and I cannot see that the difficulties are at all diminished by the recent decision of the Supreme Court in the case of *Chrysler v. McKay*, 3 S. C. 436, owing to the differences existing among the learned Judges as to the grounds of their decision.

The learned Chief Justice held that it was not necessary in that case to decide what defects substantial or formal are covered, there being in his opinion no sufficient evidence that the land was properly assessed or any taxes in arrear.

Strong, J., held that the section applied where any taxes re in arrear at the time of the sale.

Fournier, J., that the proof of the existence of taxes in arrear was insufficient; that the sale was also void, because the lands were not distinguished in the warrant as patented or unpatented; and that it was necessary to establish that taxes were due and in arrear at time of sale; and agrees with Mr. Justice Gwynne, in the construction of sec. 155.

Henry, J., that there was no evidence that the land was subject to the rate. The assessment rolls not having been produced, for aught that appeared, the land may have been assessed upon them; no sale proved, the recital in the deed being insufficient for that purpose: that sec. 155 could only be invoked where taxes are proved to have been in arrears when warrant issued; whilst Mr. Justice Gwynne held that the section in question can only be construed to remedy irregularities and defects when the event the happening of which the statute has made a condition precedent to the creation of the power to sell has occurred: viz., when some portion of the taxes imposed has been suffered to remain in arrear and unpaid for three years.

I concur in the view taken of the statute by Mr. Justice Gwynne, and take this opportunity of confirming his impression of what was actually intended to be decided by this Court, in *Jones v. Cowden*, where the fact that the taxes had been legally imposed and were in arrear for the prescribed period was assumed by all parties, and that being so that the mere irregularities in the procedure were cured by the delay and the Act of Parliament.

In the present case it appears to me that there never was a tax legally imposed, the non-payment of which would justify a sale; in other words, there was no tax in arrear for three years, which would alone give rise to and authorize the exercise of the power to sell.

The case to my mind is clearly distinguishable from cases in which the assessor in violation of his duty assessed land as unoccupied, when in fact it is occupied. The owner is here assessed in one gross sum for lands which he did not own, and which to the knowledge of the

assessor was not liable to be assessed as non-resident, and which he did actually assess as resident. This, as it seems to me, is more than a mere irregularity; it must, I think, be regarded as a void assessment, and the subsequent sale, which as regards the Great Western Railway is admitted to be void, must, I think, be regarded as void altogether.

For these reasons I think the judgment below should be affirmed, and this appeal dismissed, with costs.

PATTERSON, J. A.—I agree in dismissing the appeal, on the ground of the invalidity of the tax sale, which was that on which the decision in the Court below proceeded. I form no opinion on the question of the alleged fiduciary relationship between the parties.

PROUDFOOT, J.—I agree in the judgment just read by my brother Burton, that the irregularities in the proceedings that led to the sale of the land in question are of such a serious character as to invalidate the sale, and that they are not cured by the R. S. O. ch. 180, sec. 156, as the bill was filed within two years from the date of the sale, nor by any other section in the Act.

But I desire also to add that, in my opinion, the defendant cannot be permitted to hold the title he has acquired because there was a fiduciary relation established between him and the plaintiff, and that the plaintiff is entitled to the benefit of the purchase. I regret to find that in coming to this conclusion I differ not only from the learned Judge who pronounced the decree, but from the other members of this Court. This leads me to doubt the accuracy of the result at which I have arrived, but the parties are entitled to the benefit of my view whatever may be its value.

This question is not of easy solution, but after giving it the best consideration in my power, I think that there was such a fiduciary relation existing between the plaintiff and defendant, in regard to this land, as to prevent the defendant from becoming the purchaser.

There is no doubt that for several years the defendant

had acted as agent in paying taxes on these lands for the plaintiff. These may have been isolated instances of agency, in which the defendant was employed for the occasion to hand the taxes to the officer who was to receive them, and perhaps do not of themselves establish a general agency for the plaintiff, or a continuous agency to pay the taxes from year to year as they accrued due. But the relation of the plaintiff to the defendant does not depend entirely on the matter of the taxes. And it is to be remarked that while the defendant denies his being agent, he seems to have rested that denial on the fact that he was not acting under a written authority. I will endeavour to ascertain what the defendant's position was in regard to this land in and prior to 1875, the only year in which the taxes seem to have been properly assessed, bearing in mind the rule in equity supported by a long current of authority, that "he who is entrusted with the business of others cannot be allowed to make the business an object of interest to himself." In 1862 the defendant was advising the plaintiff in regard to these lands, telling him that a tenant, Cunningham, had removed from the land to avoid payment of the taxes. In 1865, one Smith had leased the 400 acres, and in December, 1866, the defendant writes to the plaintiff telling him that Smith, who leased the lots, "gave them up last summer, and I prevailed upon a very good man to take an assignment of the lease, but he finds the taxes so high, caused to some extent by the gravel road expenditure, that he called to-day to give them up. Talking the matter over, I think he will take them for a term of years (say five), and will clear up about ten acres of old slashing, and straighten up the rubbish. Should you agree to this he will pay up this year's taxes \$39, road work \$6,=\$45. Let me hear from you in reply, soon as possible, so that I may, if possible, secure the payment of taxes."

This letter establishes that McNabb considered himself so much an agent in the management of the property as to justify him in accepting a surrender, or rather procur-

ing an assignment, from the tenant to another person, and then accepting a surrender from the latter, neither of these being shewn to be in pursuance of any powers in the lease, and that he was exerting himself to procure another tenant for the land, the avowed object being chiefly to secure the payment of the taxes.

Coming down to 1874, there are in that year a number of letters from the defendant to D. Fleming, a brother of the plaintiff, but I think it plain that D. Fleming was but acting for the plaintiff, and that McNabb knew it, and that though two of the lots may have been assessed to D. Fleming, the beneficial owner was the plaintiff. In February, 1874, the defendant is advising with D. Fleming about how much he should require from the Railway Company for the right of way through the lots. In March, 1874, he tells D. Fleming he can make an arrangement with a respectable person to take charge of the land, and to pay taxes, &c., for the current year and during time of lease. "I will see the conditions carried out. \* \* I hope you will allow the person I have in view to have a lease of the lots." Here is a plain undertaking to act in the management of the property if a lease made.

On 4th April, 1874, he transmits the assessment schedule for 1873 and 1874. On the 30th April, 1874, he writes that Tully, the expected tenant, had backed out, and that one Sibbald had that day called to inquire about the land. "He will take it for ten years for the taxes and statute labour. Please let me know what answer I shall give him."

On the 19th June, 1874, he tells D. Fleming that he had been looking after a man who had cut hay on the land to get payment from him.

These are all the acts of a person engaged or engaging himself in the management of the property, and calculated to induce the belief, and did induce it, that he was interesting himself for the benefit of the owner.

On the 17th December, 1874, the defendant is notified as agent of the plaintiff that the taxes for two of the lots

amounted to twenty-four dollars, and on the same day as agent for D. Fleming that the taxes on the other two lots amounted to twenty-five dollars and twenty-three cents, which he must have forwarded to the principals, or rather to the plaintiff, for we find that on the 8th May, 1875, the plaintiff sends them to Hall, with a request to attend to it, and on the 11th May, Hall sends them to the defendant with a request to settle them. The defendant pays them, and on the 22nd May sends to Hall the treasurer's receipt for both sums, fifty-five dollars and fifty cents. Hall was plaintiff's father-in-law and resided in Peterborough, a long distance from the lands in question, and was requested by the plaintiff to attend to this matter, and he naturally employs the local agent, the person specified in the assessment notice as agent, to do it for him. In doing so the defendant was the agent of the plaintiff, not of Hall.

It appears that one Harmer was using the land in 1874. It does not very clearly appear how he first went there, but in May, 1875, a lease was made to him of the whole of the land by the plaintiff through his agent Hall for five years, from 1st April, 1875, at a rent of sixty-five dollars a year, and tenant to pay taxes, but payments for taxes were to be deducted from the rent. The defendant knew Harmer very well, that he was a tenant of the plaintiff's, and that he retained possession till ejected by the defendant after he bought, and he believed he was the man to pay the taxes, though defendant says he never saw the lease.

On 11th August, 1875, defendant writes to D. Fleming in regard to selling these lands, which by this time, at all events, he knew all belonged to the plaintiff, and writing to David must have been to him the same as corresponding with the plaintiff. He says: "When the Saugeen lands are placed in Blaikie & Alexander's hands for sale, I think it would be well that reference be made to John Eastwood, Port Elgin, and also to me. To the former, Blaikie & Alexander should write, stating terms and conditions of payment, and should he find a purchaser promise a certain sum, say fifty dollars."



Here is a clear proposal to exert himself to find a purchaser for these lands for the owner. This, I think, placed him in such a position with regard to these lands as to preclude him from being a purchaser until he had denuded himself of the character of agent to find a purchaser. His interest would have been to buy cheaply, while his duty in the character he assumed was to sell dearly.

I do not know if the lands were ever placed in Blaikie & Alexander's hands for sale, nor do I think it material, as I think it plain that had the lands been sold that year for taxes he could not have become the purchaser. He had done an act to induce confidence to be placed in him, and we ought to assume that it was placed in him, as nothing to the contrary is shewn. And if he could not have bought in 1875 the same disability continued till 1878, and no act is shown to prove that he had withdrawn from the position of trust. And any such act must have been a clear determination of the relation he had assumed.

But the case does not rest here, for the conduct of the defendant at and subsequent to the sale is the strongest possible evidence of the view he took of his own position. He employs a person to attend the sale and bid for him, authorizing him to bid down to (10) ten acres in each lot: "Buy all in your own name; I don't want to be known; so please buy in your own name." Why all this anxiety not to be known?—that the purchase should be made in another's name. There is a very obvious reason for it—that he knew he ought not to buy at all; that he occupied a position of trust and confidence towards the plaintiff—confidence induced by his own conduct and professions of friendship.

But if a darker shade is needed to indicate the character of the defendant and the true nature of the transaction, it will be found in what occurred during the year 1879, while the property might still have been redeemed. Hall, one of the plaintiff's agents, called on the defendant, in company with Harmer the tenant, and consulted with the defendant about building a new barn, and making a new

arrangement with Harmer. The defendant told Hall that Harmer was a good tenant (in another place he quibbles about this, and says he said a good man).

But he did not tell Hall that the land had been sold for taxes, nor did Harmer know it. He admits he knew that Hall would have paid the taxes at once had he known it, and not have allowed \$8,000 worth of property to go for \$200. He recommended Harmer as a good tenant, although he knew or supposed it was his duty to pay the taxes, and yet that he had not done it. He thus encourages Hall to make an arrangement with Harmer to have a barn built at a considerable expense, and a new lease made; and he admits he did not tell him for fear he might redeem the place. Now seeing the friendly relations that had existed between the plaintiff and the defendant; the almost officious proffer of his services; the confidence induced thereby; it seems to me that such a fiduciary relation is established as prevented the defendant from purchasing to the prejudice of the plaintiff.

The letters of the defendant and of his son of the 10th July, 1880, fully justify the indignant language of the Chief Justice in this case. On the 8th July Hall wrote to the defendant of his surprise at hearing he had become the purchaser, and that the time for redemption had passed, and taking blame to himself for not having attended more carefully to seeing that the taxes had been paid, and desiring to know how the plaintiff could get his land back. In reply the defendant tells him that the tax deed is held by his son, that he, the defendant, has no say in the matter. This turns out to have been a deliberate falsehood, and the defendant did not dare to reiterate it in his examination. The son's letter is a confirmation of the father's lie, and generously offers to give up the land for \$4,000.

Up till this time the defendant had been on friendly relations with the plaintiff; professing a desire to further his interest; remarking on the fraudulent conduct of other persons mentioned in their correspondence; assuming a high tone of morality; it is that case of extreme injustice,

of hypocrisy united to fraud, where the greatest deception is practised under the guise of honesty and fair dealing. *Totius autem injustitiæ nulla capitalior est, quam eorum, qui tum cum maxime fallunt, id agunt, ut viri boni esse videantur. De Off. 1, 13.*

I think the decree should be affirmed, with costs.

I had written the foregoing judgment before ascertaining that my brother Burton had discovered that the letter printed in the Appeal Book bearing date the 11th August, 1875, was in reality dated the 11th August, 1874. It has been argued that, from the plaintiff's letter of 21st October, 1874, shewing some disagreement between him and the defendant, the friendly relations of the plaintiff and the defendant had ceased. But that does not seem to have been the case, for in May, 1875, the defendant was still looking after the payment of taxes on the land. No doubt the change in the date of that letter somewhat weakens the force of my argument, but it does not destroy it.

HAGARTY, C. J., agreed with the conclusion arrived at by the other members of the Court.

*Appeal dismissed, with costs.*

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## MARTIN V. MCALPINE ET AL.

*Cognovit—Collusion—Remedy against colluding creditor.*

The plaintiff was suing the defendant, F., who was in insolvent circumstances, when the defendant, M., applied to him, and by threats of action to enforce his claim, and a promise to give time to F. if he acceded to his request, induced F. to execute a cognovit whereby M. obtained priority over the plaintiff. Both parties placed writs of execution in the sheriff's hands. Under that at the suit of M., the goods of F. were sold, M. buying part thereof, the price of which he retained on account of his judgment and received the balance from the sheriff. *Held* [reversing the judgment of the Court below, 3 O. R. 499], that the cognovit was collusive and void under R. S. O. ch. 118, sec. 1, and the amount realized at the sale by the sheriff was properly applicable to the plaintiff's writ. *Held*, also, that a judgment for payment by M. to the plaintiff of the proceeds of the sale could properly be made in this action.

THIS was an appeal by the plaintiff from a judgment of the Chancery Division pronounced by Proudfoot, J., reported 3 O. R. 499, where the facts of the case and the points involved are clearly stated and came on to be heard before this Court on the 15th of March, 1883\*.

*Moss, Q.C., and P. S. Martin, for the appellant.*  
*S. H. Blake, Q.C., for the respondent.*

In addition to the cases cited in the Court below, *Grant v. Van Norman*, 7 A. R., 526, was referred to.

June 29, 1883. SPRAGGE, C. J. O.—The statute under which the bill in this case is filed, R. S. O. ch. 118, enacts that, *inter alia*, a cognovit actionem given by a person in insolvent circumstances, voluntarily, or by collusion with a creditor, with intent in giving the same to defeat or delay his creditors wholly or in part, or to give one or more creditor a preference over other creditors, shall be null and void as against creditors, and shall be invalid and ineffectual to support any judgment or writ of execution.

The case went off in the Court below upon the short point that the cognovit given by the debtor to the defendant was not given voluntarily, but upon pressure exer-

\*Present—SPRAGGE, C. J. O., BEATTY, PATTERSON, and MURPHY, J. J. A.

cised upon Farrell the debtor by the defendant, and that therefore it did not come within the statute; and the learned Judge referred to *Brayley v. Ellis*, decided upon the same statute by Mr. Justice Ferguson, reported 1 O. R. 119 (a). *Brayley v. Ellis*, however was not a case of a *cognovit* being given, but of a chattel mortgage given in pursuance of a previous agreement which cast upon the debtor the duty as between himself and his creditor of giving that mortgage; and which is governed by another clause of the Act. The question whether the *cognovit* given by Farrell was given by collusion with his creditor, the defendant, with the intent to defeat or delay his creditors does not appear to have been considered by the learned Judge.

The question whether Farrell was an insolvent debtor within the meaning of the Act is not in terms decided in the judgment appealed from. The evidence I think shews very clearly that he was; and I gather from the judgment that the learned Judge would have so decided if in his judgment it had been necessary to determine that point.

I agree that there was pressure; and if where there is pressure the giving of a *cognovit* by an insolvent is not impeachable, although it be given collusively with the intent pointed at by the statute, I should concur in the correctness of the judgment.

The statute describes two sets of circumstances under either of which a *cognovit* given by an insolvent debtor is to be deemed and taken to be null and void. One is, if given voluntarily. Granted that this *cognovit* was not given voluntarily, so far it is not impeachable; but what if given under the other set of circumstances, collusively, and with the intent pointed at by the statute? Its not being impeachable on the one ground cannot save it if impeachable on the other. To save it if impeachable on the other ground, we should have the conjunction, "and," where we have the disjunctive, "or." As it stands the existence of

(a) 4th March, 1884. The Court being equally divided, an appeal in that case was dismissed.

either set of circumstances must be fatal. To hold otherwise would not be giving to the words used their ordinary grammatical meaning. The learned Judge has not dealt with what I have called this second set of circumstances. It is in my opinion necessary to do this.

Martin, the plaintiff in this suit, was beforehand with McAlpine in bringing suit against Farrell, their common debtor: McAlpine's object was to displace Martin from this position of advantage, and obtain it for himself. To effect this he proposed to Farrell that he should aid him to obtain this position by giving a *cognovit*, and he proposed an advantage to Farrell to induce him to do this, viz., that he would not press him for the recovery of his debt, but give him time, breathing time, as the debtor calls it. There was mutual advantage in this. Farrell to obtain an advantage to himself agreed to give an advantage to McAlpine, as proposed by McAlpine. It was very literally a collusive bargain. The two played into each other's hands for their mutual benefit, but at the expense of creditors other than the party who proposed this scheme. Its necessary effect was to delay, if not to defeat other creditors; and the intent clearly was to give the one creditor, McAlpine, a preference over the other creditors of Farrell. There may have been other modes by which this could have been effected; but the statute says that a *cognovit* given under such circumstances, and for such purpose, shall be null and void as against other creditors, and that is all with which we have to deal.

I agree in the view taken of this question by Boyd, C., in *Meriden Silver Co. v. Lee*, 2 O. R. 451.

We are referred to the case of *Brown, assignee, v. Tanner*, 19 L. J. C. P. 169. That case turned upon the effect of pressure, under the Bankruptcy Law, combined with a desire on the part of the debtor to give a preference to the creditor exercising pressure. That point was thus put to the jury, "if the payment was made under the influence of the pressure and importunity of the defendant, and also with a desire to give a preference to the defendant in the

event of a bankruptcy, their verdict should be for the defendant." It was held to be rightly put to the jury, Parke, B., being reported to have said that the direction was in accordance with the rule that to be a fraudulent preference the payment must be both voluntary and in contemplation of bankruptcy; that both these circumstances must concur. The difficulty suggested is not very directly met in the judgment. It is, however, assumed that the preference being in accordance with the desire of the debtor, was still not necessarily voluntary if made under pressure and importunity of a creditor; and the case really determines nothing more than that. *Edwards v. Glyn*, 2 E. & E. 29, is a decision to the same effect.

It is objected for the defendant that the plaintiff is too late: that after the money has been levied upon execution the plaintiff cannot recover it; and that the plaintiff accepted the position of second execution creditor. The last is a question of fact. The plaintiff's solicitor assumed that McAlpine's judgment had been recovered regularly. In fact it had been recovered upon a void instrument, which the statute declares shall be invalid and ineffectual to support any judgment or writ of execution. Any acquiescence under such a misapprehension cannot affect his rights. The cases upon this point are numerous, but I take the point to be so clear that it would be a waste of time and space to refer to them. A portion of the goods sold in execution was purchased by McAlpine himself; a portion by others; and the proceeds after deducting the sheriff's charges were paid to McAlpine. There is no question of an innocent purchaser in the case; goods and the proceeds of goods which were applicable to the satisfaction of the plaintiff's execution have got into the hands of McAlpine. He certainly cannot set up any right to them. Is there then any obstacle, legal or equitable, to the plaintiff's following goods and money into the hands of McAlpine?

In the *Merchants' Express Co. v. Morton*, 15 Gr. 274, I proceeded upon the well known principle that if the Court can trace money or property, however obtained from

the party really entitled to it, into any other shape it will intervene, to secure it for the true owner, or party entitled. Cases which I think support the judgment are referred to in that case.

I do not think that it is necessary to shew in such a case whether or not an action would lie at law for money had and received in respect of the moneys received by McAlpine from the sheriff; or whether the plaintiff could maintain trover for the goods purchased at the sale by McAlpine. As to moneys received from the sheriff by McAlpine, it was the plaintiff in this suit, who had his execution in the sheriff's hands, that was entitled to receive them; and as to the goods purchased, McAlpine was not entitled to retain the price in his hands, but should have paid it to the sheriff; and McAlpine's execution having no validity that money was applicable to the satisfaction of the plaintiff's execution. The Court seeing that McAlpine was not entitled to the money and goods in question, and that the plaintiff was entitled to the one, and to the proceeds of the other, would, having cognizance of the matter in question, properly make a direct order for the payment by the party who had wrongfully received these moneys and goods to the party entitled to them, the plaintiff.

In my opinion the appeal should be allowed, with costs.

BURTON, PATTERSON, and MORRISON, JJ. A., concurred.

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## LASH V. THE MERIDEN BRITANNIA COMPANY.

*Master and servant—Yearly hiring—Wrongful dismissal during the year.*

The plaintiff renewed his engagement for a year with the defendant company at Hamilton, to serve them in the capacity of book-keeper. Before the expiry of the time agreed for, P., one of the managers of that branch of the company, removed the books from the possession of the plaintiff, placing another in charge thereof and telling the plaintiff that he did not any longer require his services, but that if W., another officer of the company, had anything for him to do outside he would be very glad, adding, "But I have no further service for you in the office, in fact I do not want you in the office." The plaintiff refused to recognize the right of P. to thus remove him, and it was arranged between plaintiff, W. and P., that plaintiff should remain occupying his time with other work until it was ascertained from the head office if P. had the authority he asserted; and on obtaining information in the affirmative, plaintiff left.

*Held*, affirming the judgment of the Court below, that the action of the defendants was a dismissal of the plaintiff.

On the appeal the defendants urged amongst other grounds, one not taken in the rule *nisi* or raised by the pleadings, namely, that the evidence disclosed good cause for dismissal. When offered the opportunity at the trial to amend and raise such defence, counsel for the defendants declined to do so.

*Held*, that the defence could not be raised on appeal.

THIS was an appeal from a judgment of the Judge of the County Court of Wentworth, discharging an order *nisi* obtained by the defendants to set aside the verdict entered for the plaintiff, and for a new trial or for a verdict for the defendants, or for a nonsuit, in an action pending in the Court between the said parties except in so far as the verdict for the plaintiff was reduced by the sum of \$28.22.

It appeared that in September, 1881, the plaintiff was engaged by the defendants as book-keeper at a salary of \$1,000, in which capacity he continued to serve them until the 20th or 21st of November following, when one Parker, a manager of the Hamilton branch of the defendants' business, spoke to the plaintiff and, as stated in the evidence of the plaintiff, told him, as appears in the judgment, that he had no further use for him in the office. The plaintiff further stated in his evidence that on the same day on meeting Parker in the street Parker spoke to him saying :

"I want you to let Millard make the entries in the books ;" I said, 'yes,' I had not made any objections to Mr. Millard's entries in the books ; I found Mr. Millard a great assistance to me ; he had made entries in the books that Mr. Parker had given him to make. When I came to the

office something turned up in the discharge of my duties ; some letters came in, and they were opened and found to contain cheques, and the cheques were handed over to Mr. Watts; it was my duty to enter any transactions of the kind in the books, to make the original entry in the books, and acknowledge the receipt of moneys in the books, or anything of the kind. In my usual course I acknowledged receipt of these and made the proper entries for these letters. I don't know exactly what hour, but probably an hour or two after--it was in the forenoon I know. Mr. Parker came in there and he said to me, 'Didn't I tell you not to make any more entries in the books?' or, 'Didn't I tell you to let Millard make all the entries?' Well, I said, I have not objected to Millard making entries in the books; 'Well,' he said, 'I don't want you to make any more entries in the books;' I said then, 'I am discharging my duties to the company here.' Then he opened fire on me, and I had nothing more to say. \* \* Q. Did you immediately complain to Mr. Watts? A. Yes, I complained as soon as Mr. Watts came into his office. \* \* I complained to him as to what Mr. Parker had said to me. Q. Didn't he say he would write to Meriden, whether any other party had authority to say anything to you? A. Yes, it was understood between Mr. Parker and him he should write. The whole three of us were present; we all agreed I should wait until he heard from Meriden. Q. What was he to write to Meriden about? A. To see if the management was taken out of his hands and placed in Mr. Parker's; Mr. Parker concurred in that. \* \* \* Q. You did not tell him you were going to leave? A. No, I had not two words with him one way or another; Mr. Watts told me he had a reply, and I asked him what was the result, and he said it was very clear from the reply they had taken the management of the office out of his hands and he could not do anything more. There was nothing done, I said, 'very well, in that case I must leave.' I left in the afternoon. \* \* Q. Did Watts come to see you? A. No; Mr. Watts and I were very friendly; I might have seen Mr. Watts, but there were no overtures in reference to my employment; Mr. Watts said he could not see his way clear to reinstate me. Those were the very words he used. I said if he would reinstate me I would go back, and he said he could not see his way clear--the authority was taken out of his hands."

In the course of the examination of the plaintiff at the trial, *Carscallen*, counsel for the defendants, asked to plead justifying the dismissal, saying: "We did not dismiss him, but we want to allege that we had cause to dismiss him if we chose to exercise it, but we do not assign cause of dismissal."

*The Court*—Why didn't you do it before? *Carscallen*—Because we did not choose to do it. *The Court*—That is no reason. The question here is whether or not you should be allowed to insinuate something. All I say is, you cannot offer evidence of the kind without pleading it; I ask why

you did not do it, and you now say you did not choose to do it. *Carscallen*—The matter at that time was undergoing some investigation, and this man left of his own accord. *The Court*—The question is, do you wish, or do you not, to amend by charging Mr. Lash with misconduct which justified dismissal. \* \* You cannot go into the evidence unless you do." \* \*

Counsel declined permission to amend as suggested by the Court.

The manager, Parker, was also examined as a witness, and denied ever having discharged the plaintiff, or that he had ever had such a thought in his mind as to discharge him. He admitted, however, having ordered him to refrain from making entries in the cash book.

At the conclusion of the case :

SINCLAIR, J.C.C. — " I find that the plaintiff was dismissed by the defendants' manager, James E. Parker, without legal justification, and that plaintiff is therefore entitled to recover the sum of \$200 damages : and I order that judgment may be entered up therefor, with costs of suit, and execution issued thereon—but not sooner than the 5th of July next."

At the following sittings of the County Court the defendants obtained an order *nisi* to set aside the verdict and to enter a verdict for the defendants, or for a new trial. After hearing counsel for both parties.

SINCLAIR, J. Co. C.—" I have with much care considered the evidence given on the trial of this cause, and can come to no other conclusion than that in law as well as in fact there was a dismissal of the plaintiff from the company's service, and that the finding for the plaintiff was correct.

" The verdict, however, was wrongly entered for the full \$200 damages. It must be reduced by the sum of \$28.22, the amount due by the plaintiff to the defendants for goods which he got from them.

" As each party has succeeded on a material part of the order *nisi*; there will be no costs : *Sullivan v. King*, 24 U. C. R. 161 ; *Harris v. The Corporation of Hamilton*, 44 U. C. R. 646 ; *Clemow v. Booth*, 27 Gr. 15."

The defendants thereupon appealed to this Court, and the appeal came on for argument on the 9th of February, 1883.\*

*Osler*, Q. C., for the appellants, contended that there was no evidence, at all events no sufficient evidence to support the finding in favour of the plaintiff: that the

\* *Present*.—SPRAGGE, C.J.O., BURTON and PATTERSON, JJ.A.

evidence preponderated in favour of the assertion of the company, namely, that there was not any wrongful dismissal, but on the contrary that the plaintiff had voluntarily and of his own wrong left the employment of the defendants. But even if the Court should be of opinion that this was not the case, the evidence, it was insisted, disclosed sufficient ground for dismissal, namely, a refusal by Lash to obey the lawful and reasonable order and direction of Mr. Parker, the manager of the defendants' works.

*MacKelcan*, Q. C., for the respondent. The question simply comes to this: it being shewn that the plaintiff was engaged to serve the defendants in the capacity of book-keeper, was Mr. Parker or any other officer of the company at liberty at his mere will and pleasure to degrade him from that position and insist upon his discharging duties of a more subordinate character, or leave them at liberty to say that he had left of his own accord? The simple fact of taking the books, particularly the cash book, out of his possession, was such an act as fully justified the plaintiff in considering himself dismissed.

June 29, 1883. BURTON, J. A.—This is an appeal from a judgment of the Judge of the county Court of Wentworth, discharging a rule *nisi* to set aside the verdict.

The action was one for wrongful dismissal, in which a verdict was rendered by the Judge without a jury in favour of the plaintiff, and the rule was for a nonsuit on the ground that there was no evidence, or for a new trial on the weight of evidence, there being, it was contended, no dismissal shewn.

A further ground is taken in the reasons of appeal not taken in the rule *nisi*, viz.: that the evidence discloses good cause for dismissal, which is not, I think, open to the defendants on this appeal, not only because no such defence was raised upon the pleadings, but because when afforded the opportunity of raising such an issue by the learned Judge the defendants' counsel deliberately declined to make the amendment.

The question is therefore narrowed into whether there was evidence, or sufficient evidence, to warrant the Judge in coming to the conclusion that what occurred here amounted to a wrongful dismissal.

The plaintiff was admittedly engaged as book-keeper and was not bound to serve the defendants in any other capacity. If not allowed to perform those duties, he was not compellable under his engagement to undertake others, but had a clear right to treat the refusal to allow him to continue in charge of the books, as equivalent to a dismissal.

The way in which the plaintiff himself states the occurrence is, that Parker thus addressed him: "I tell you, Lash, you are no longer book-keeper here. I am in charge of this office and the books of the office, and if Mr. Watts has any thing to do for you outside, I will be very glad, but I have no further service for you in the office: in fact, I do not want you in the office."

It was urged that the plaintiff did not leave immediately, but remained for some days, but this is very satisfactorily accounted for, as there appeared to be some doubt whether Parker or Watts had the authority to dismiss, and it became necessary to communicate with the principals. Parker's position having been maintained, the plaintiff at once left, having under protest employed himself on other work in the interval.

I am not saying that there is not even on the defendants' own shewing ample evidence of a dismissal, but it was quite open to the learned Judge to prefer that offered by the plaintiff. We can see no ground, therefore, for interfering with his decision. According, however, to the evidence offered for the defendants, the person who had up to the 20th November been assistant book-keeper under the plaintiff was put in charge of the books, and from that time their positions were reversed. It seems almost idle to contend that that was not equivalent to a dismissal.

I am of opinion that the appeal should be dismissed, with costs, and the judgment below affirmed.

The amount of the verdict appears somewhat larger than plaintiff claimed, but no question as to the amount was raised before us.

SPRAGGE, C. J. O., and PATTERSON, J. A., concurred.

*Appeal dismissed, with costs.*

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GOODERHAM V. TORONTO AND NIPISSING RAILWAY  
COMPANY.

*Railway company—Working expenses and outgoings—Receiver—Debts due before appointment—Accounts.*

A receiver of the defendants' railway had been appointed to take the revenues, issues, and profits, to pass his accounts periodically, and to pay into Court the balance due from him after providing for the working expenses and outgoings of the railway. The Master was directed to take an account of all persons entitled to liens, charges, or incumbrances and to settle their priorities, and the money to be paid into Court was to be paid to such persons according to their priorities to be ascertained.

*Held*, affirming the decision of PROUDFOOT, V. C., that the Master, in taking the receiver's accounts, should have allowed debts paid for working expenses which were not regularly payable until after his appointment, but not those already in default at that time, which were properly payable out of the moneys to be paid into Court according to their priority.

THIS was an appeal by Joseph Gray, the receiver, from an order pronounced by Proudfoot, V.C., disallowing certain items of expenditure made by the receiver, and which had been credited to the receiver by Mr. Taylor, the Master in Ordinary, on passing his accounts.

The items objected to were, \$1,438.92 paid for fuel, as it was paid for fuel procured prior to the receiver's appointment; \$3,450.27 paid to the G. T. R. Co. for tolls, as they were due when the receiver was appointed; \$944.74 for material, stores, &c., for the same reason; \$3,987.99 for

ties delivered prior to the receiver's appointment, and all of them used on the road; and \$13,636.28 for steel rails, all delivered and used prior to the appointment of the receiver.

The appeal came on to be argued on 22nd September, 1880.\*

*MacLennan*, Q.C., and *Kingsford*, for the appellant, contended that all expenses for the maintenance, repair, and working of the railway were properly paid and payable by the receiver, whether the same were past due at the time of his appointment or not, and that the ties, steel rails, and other supplies and materials of the railway could always be best obtained upon credit and in large quantities, and the construction appealed against would paralyse and ruin the undertaking, as no one would give the company credit for a day at the risk of being postponed to all the liabilities, bonds, &c., by the appointment of a receiver. That the funds to which bondholders had a right to resort for payment did not depend on the appointment of a receiver. The duty of the receiver as to the application of the income was precisely the same as that of the directors. Both the one and the other must provide for the maintenance of the undertaking with ordinary and reasonable efficiency before paying anything to bondholders, and the date of the receiver's appointment could not make any difference as to the propriety of paying any particular item. That the only question with regard to any item was, was it reasonably necessary or proper for the repairs, or maintenance, or working of the railway at the time when it was incurred? If it was, then it was properly paid by the receiver. If not, it should be disallowed. The mere fact that the receiver had omitted or neglected to apply for directions, was not sufficient to warrant the disallowance of any item; the sole question being, whether the payment was lawful or not. The practice of applying

\**Present*, Moss, C. J., BURTON, PATTERSON, and MORRISON, JJ. A.

for directions could not apply to such a case. See R. S. O., ch. 165, sec. 101 and *Gardiner v. London, Chatham, and Dover R. W. Co.*, L. R. 2 Chy. 201.

*R. M. Wells* and *W. Cassels*, for the respondents. The direction contained in the decree that the receiver do pay into Court the balance, "after providing for the working expenses," &c., can only apply to working expenses incurred after the appointment of the receiver. The payments objected to were not working expenses within the meaning of the decree, but should be proved as claims or debts, when the priorities would be established in the presence of those entitled to contest the claims. The decree in *Fox v. Toronto and Nipissing R. W. Co.*, directed an account to be taken of the debts and liabilities of the company, and directed the Master to state the rights and priorities of the persons interested in the moneys to come into the hands of the receiver. The receiver filed a statement in that suit in the Master's office, of such debts and liabilities, and it therein was stated that there was due to the Bank of Toronto, "for moneys advanced for repairs to the railway for rails, \$13,331.41, up to the 15th April, 1879." The Master found that debt, which is the same as the one in question, eighth and last in priority, and yet the receiver adjudged it first in priority, and paid it accordingly. No claims were ever filed or proved in the Master's office in respect to the other items objected to, nor was this priority in rank ever ascertained by the Master; the receiver assumed himself to judge of their priority and paid them accordingly. The items objected to neither had nor were entitled to have any priority over the claims of the respondent, and the receiver had no right to give them such priority; and the claim of the respondent being in respect of the construction of the railway, should rank at least as high as any of the claims which the receiver paid.

Moss, C. J., died after the case had been argued, and the parties agreed to accept the judgment of the other three Judges.



February 6, 1883. PATTERSON, J. A.—The appeal is by the receiver appointed under decrees in this action and the action of *Fox* against the same defendants. The decree in this action is dated 5th April, 1879. It orders the appointment of a receiver of the defendants' railway and undertaking, and of the revenues, issues and profits thereof; names Joseph Gray, the secretary of the defendants, as such receiver; and directs that he do pass his accounts every two months before the Master, and pay into Court the balance to be certified to be due from him from time to time *after providing for the working expenses and other outgoings* of the said railway and undertaking.

The same decree ordered that the Master should take an account of all persons entitled to liens, charges, or incumbrances upon the railway and undertaking, revenues, earnings, and profits thereof, and settle their priorities; and that the money to be paid into Court by the receiver be paid to such persons according to their respective priorities so to be ascertained. The decree in *Fox's Case* was similar in its effect, but is somewhat more general in the directions to the Master, which are to "inquire and state what are the *debts and liabilities* of the company, and what are the rights and priorities of the persons interested in the moneys to [come into the hands of the said receiver."

The first account seems to have been brought in by the receiver in October, 1879, covering the period from 1st April to 30th September of that year.

Objections were made to some of the payments made by the receiver. The Master allowed some of these objections and disallowed others. On appeal to Vice-Chancellor Proudfoot some of the objections which the Master had overruled were sustained, and the payments disallowed. Hence this appeal.

The contest turns upon the construction of those words in the decree which I have italicized. Were the disallowed payments "working expenses and other outgoings?"

The accounts filed by the receiver shewed receipts

amounting to \$86,808.43 ; and payments of \$85,917.52, leaving a balance of \$890.91 on hand ; but shewing that that balance was held to meet further working expenses and outgoings, a list of which he gave, and which came to \$631.34, in addition to which he stated there would be a large amount to pay for September purchases, which he was unable to state until he should receive the mechanical superintendent's statement and certificate.

Messrs. Fox, the plaintiffs in the other action, are judgment creditors of the company for a debt due in respect of the construction of the railway.

They attended before the Master, by their counsel, and objected to the allowance of several items paid by the receiver, because, although they were for debts incurred in the working of the railway, and might therefore have been properly called working expenses, they had been incurred before the appointment of the receiver, and therefore, as it was contended, were not included in the working expenses and outgoings which the decree authorized him to pay.

There were two items to which, in addition to the point as to the time at which the debts were incurred, it was objected that they were not for working expenses. One of these was No. 5, being \$13,636.28 paid for steel rails. The other was No. 6, and was for something over \$2,000 expended on a wharf at Sutton.

The Master disallowed the last named item, and allowed all the others.

The creditors thereupon appealed to the Vice-Chancellor, who referred back the report to the Master, to review in accordance with what was, in his judgment, the correct application of the terms of the decree to the facts presented.

We have the advantage of written statements by both the Master and the Vice-Chancellor of the grounds on which they proceeded.

I do not think there is any material difference in the construction put by them upon the terms of the decree, so far at all events as they have expressed their views in

language. The divergence seems rather to exist in the application of the principles on which they agree.

The Master thus states his views :

"It must be borne in mind that the decrees in these suits are not for winding up the company. They contemplate its being carried on. Now, a concern such as a railway cannot pay cash for every article it requires to buy from day to day. The fuel, for instance, is by the contractor cut into short lengths fit for use in the engines and put in racks at certain stations along the line. From these racks it is taken by the engine drivers as required. At the end of the month the agents at the stations send in returns of the quantity of wood so taken. These returns are checked over, and afterwards the contractor is settled with.

"In the same way it is notorious that oil for use on the engines and for car axles, brass and iron for making repairs to engines, lumber for repairing cars, and a multitude of other things, must be got by servants of the company, who have not the money of the company in their hands to pay cash for what is got, but who simply certify the accounts, which are afterwards passed and paid from the head office.

"In this way, at any given moment, there must be a considerable amount due for necessary expenditure for the working of the railway, either for articles in store yet to be used or which have already been used.

"It can never have been the intention of the Court by the decrees, to alter all the mode of dealing. In the ordinary course of things, the fuel supplied, the material purchased in March, or even further back, would fall to be paid for in April or in May, or even later.

"The mere fact that on the 5th day of April, a receiver was appointed, cannot, in my opinion, be a reason for saying that the amount then properly owing by the company for working expenses and other outgoings, and which would, in the ordinary course of the company's business, have been paid for after that date, should not be so paid for."

I do not see anything to object to in this, having regard particularly to the concluding reference to the ordinary course of the company's business.

The same view of it was taken by the learned Vice-Chancellor, who said: "So far as the fuel, oil, lumber for

repairing cars, and such like expenditures are concerned, I agree with the Master, and if in the ordinary course these were not payable till after the 5th of April, 1879, they should be allowed."

Besides the items of expenditure thus enumerated, there were (No. 2) payments to the Grand Trunk Railway Company for the use of their line from Scarborough Junction to Toronto, which the Vice-Chancellor held to be working expenses within the Railway Act (R. S. O. ch. 165, sec. 101); and (No. 4) ties used for replacing others which were decayed, which the Master had not mentioned in his judgment. To these items the Vice-Chancellor applied the same rule, holding that the receiver should be allowed for transactions after his appointment, and for payment of debts incurred before his appointment, but not, in the ordinary course, payable till afterwards; but that he was not entitled to pay on any of the accounts sums which, at the time of his appointment, were in the position of ordinary overdue debts.

The complaint urged against the action of the Master is, that while, in what he says, he lays down the correct rule, he has not, in taking the account, discriminated between debts which were not regularly payable until after the receiver's appointment and those, which were then already in default, but has allowed all payments of debts incurred for working expenses; and that the large item for steel rails ought not to have been classed with the working expenses.

This item is dealt with in the following passage of the Vice-Chancellor's judgment:

"The sum paid for steel rails is not a sum that appears to me to come within the class of expenses to be paid by the receiver. They had been purchased and laid on the road in 1878. They had become part of the road. The price of them was a debt of the company, and should have been so reported. The price was no more an expense than the claim of the plaintiff on construction account of the railway, and if the receiver were at liberty to pay outgoings of the railway at any time prior to his appointment, he might in this way pay for the whole construction of the

road; but that was not the meaning of the decree. The receiver was to pay expenses to keep the railway going, not to pay debts incurred previously in constructing and maintaining it."

It will be worth while to refer to the terms of the formal order, which correctly embodies the conclusions on which the judgment rests, as well for the sake of distinctness, as because the first of the reasons against the appeal is drawn with express reference to it. It reads as follows:

"1. This Court doth declare that the receiver herein should only be allowed under the words 'working expenses and other outgoings,' for such payments as were made for fuel, oil, lumber for repairing cars, and such like expenditure necessary to keep the railway going, and which have been purchased since the appointment of such receiver, or which although purchased before the appointment of the receiver, were not in the ordinary course of business to be paid for until after such appointment; and doth order the same accordingly.

"2. And this Court doth further order that with respect to the items and payments above mentioned and numbered *five*, the said appeal be and the same is hereby allowed, and as to the items numbered *two* and *four*, that the same be and the same are hereby allowed so far as the same relate to payments for debts incurred for Grand Trunk tolls before the appointment of the receiver herein, and for ties purchased before the said appointment, and the time for payment of which in the usual course of business had prior to the time of such appointment arrived; but is disallowed so far as the same relate to payments of tolls to the Grand Trunk Railway incurred since the said receiver's appointment, and for ties purchased by the said receiver for the purpose of repairing the road and replacing those ties already in use, and which by reason of rottenness had become unfit for use, and for those purchased before his said appointment, the time for payment of which had not in the usual course of business arrived until after the appointment of said receiver.

"3. And this Court doth further order that with respect to the items and payments above mentioned, and all other of the said items not hereby disposed of, the said report be referred back to the said Master to review the same; and it is also ordered that the parties are at liberty to

apply to this Court upon the question of costs, after the said Master shall have made his report."

The general position taken by the receiver upon the present appeal is very concisely and clearly put in his first reason of appeal; the other "reasons" being mainly arguments in support of that position. It is thus expressed:

"1. The appellant objects to the construction of the decree contained in the first paragraph of the order appealed from, and contends that all expenses for the maintenance, repair, and working of the railway, were properly paid and payable by the receiver, whether the same were past due at the time of his appointment or not."

After this somewhat particular reference to the history of the contest, I have but little to add beyond expressing my opinion that the learned Vice-Chancellor has correctly dealt with the whole matter.

I have not been able to see, after carefully considering the arguments addressed to us and the authorities cited, that the construction put upon the terms of the decree is too narrow, or that any creditor need apprehend injustice from that construction being enforced.

When the receiver is directed to provide for working expenses and other outgoings, out of the earnings of the railway which shall come into his hands, and to pay the balance into Court to be distributed amongst the creditors according to their rights as ascertained by the Master, which is the duty imposed upon him by each decree, there is nothing in the terms employed to suggest the payment of any expenses but such as would ordinarily be spoken of as current expenses, or those incurred or payable from day to day, while the money he received was being earned.

The Vice-Chancellor and the Master agree in extending the meaning of the term "working expenses and outgoings" beyond the date of the receiver's appointment, so as to include all such expenses as would in the ordinary mode of doing business be payable out of current earnings. I agree with them in this; and I believe I agree with both of them,

as I certainly do with the Vice-Chancellor, in confining my understanding of the *ordinary mode of doing business* to the mode adopted, for reasons such as those explained by the Master, as most advantageous or convenient, and excluding other modes or expedients to which a company may be driven by its necessities, and the natural result of which is the creation of debts.

Payments in cash for supplies or wages, or periodical payments, made at the usual times, for things procured, in the ordinary course of dealing, on a short credit, I should consider proper "outgoings" of the day. This word "outgoings," used as it is synonymously with "working expenses," helps to fix the meaning of the latter term as referring to present and not past transactions. One would hardly speak of the working expenses of a former period as "outgoings" in the working of the railway at a later time. But without laying stress upon any critical reading of the language, which nevertheless seems to me a fair way of testing its meaning, but regarding the term "working expenses" in the ordinary signification of the words, and also in relation to the purpose of keeping the railway going notwithstanding the appointment of the receiver, I take the intention plainly to be to include those expenses which were necessary to keep it working, and that there was no idea, as there would have been no necessity, to include expenses of by-gone times by which the present working of the road was no more affected than it was by any overdue debenture or coupon.

These other debts are not prejudiced by the decrees. They are to be paid according to their priorities, though not by the hand of the receiver. If an old debt for working expenses is entitled to priority over coupons or bonds, that priority is preserved. If not so entitled, it cannot be argued that it was intended by the decree to create a new right.

I cannot see that a stoppage of the undertaking or any like mischief is likely to result from the decrees as construed by the Vice-Chancellor, which permit prompt pay-

ment of all current working expenses, whether incurred after, or to some extent before, the appointment of the receiver. On the other hand, that officer's action seems calculated to produce those very mischiefs.

If I correctly understand his returns, he represents that he had left unpaid and unprovided for, at the end of September, \$8,000, or thereabouts, of current expenses, besides the September purchases, while he had taken upon himself to pay old debts, such as the \$13,000 for steel rails, and other items which, upon further inquiry by the Master, may turn out to have been, as it is alleged they were, merely old debts, although originally incurred for working expenses.

I am of opinion that we should dismiss the appeal, with costs.

BURTON and MORRISON, JJ.A., concurred.

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THE CANADA LANDED CREDIT COMPANY V.  
THOMPSON ET AL.

*Paid valuator—Excessive valuation—Fraud—Practice—New trial.*

In order to render the paid valuator of a loan company answerable for a loss caused by excessive valuation of property, it is not necessary to shew that such valuation is made fraudulently.

The Court below dismissed a bill filed to enforce a claim for damages sustained by an excessive valuation of land by the brother and partner of the paid valuator duly appointed by the plaintiffs, on the ground that it was not shewn that the valuation was made fraudulently. This Court, while differing from such view, declined to reverse the decree and ordered a new trial, at which the evidence of one of the defendants already taken might be used, in the event of his then being out of the jurisdiction, but ordered the defendants to pay the costs of the appeal; the new trial to be without costs in the Court below.

THIS was an appeal from a decree of the Court of Chancery dismissing the bill of the plaintiffs, The Canada Landed Credit Company, filed 9th March, 1880, against John Matthew Thompson and William T. Thompson, setting forth, that in March, 1878, one William McKee and wife joined in making a mortgage to the company, for the purpose of securing the repayment of \$500 advanced by the company to McKee: that the defendant J. M. Thompson had in December, 1875, been duly appointed the valuer and correspondent of the plaintiffs at Cannington, and that he, in company with his brother, the defendant Wm. T. Thompson, carried on business as surveyors of land; money, land, and insurance brokers at that place; that the application for the loan of such \$500 was sent to the company by the defendants: that the defendants were well aware that the company only advanced one-half of what the property offered as security would produce in cash on a forced sale by auction: and that the defendants had had a large and long experience in the making of investments on mortgage securities, and were well aware of the risk attending the lending of money on a smaller margin; and were also aware that the plaintiffs had not any personal knowledge of the property offered by McKee, and the company there-

fore relied entirely on the opinion of the defendants as such valuers: and that on the 8th of March, 1878, the defendants, by W. T. Thompson, in the usual course, reported to the plaintiffs that the then present selling value of the property offered by McKee was \$1,400; placing the value of the land at \$1,200, and that of the buildings thereon at \$200.

The bill further stated that the valuation was made upon one of the usual printed valuation sheets or reports of the company and contained the following, amongst other questions and answers:

“Q. Is it cleared property or are there stumps upon it? A. 25 acres cleared, of which 16 acres are free of stumps. Q. Is the soil rich or poor, clayey, limestone, or sandy? A. About 80 acres of very good soil, remainder, (thirty two acres) shaley limestone. Q. Is it dry or swampy? A. A little swampy, (10 acres,) rest dry. Q. What could the property rent for per annum? A. Not sufficiently cleared to rent for more than \$50 a year. Q. What are the taxes upon it? A. Last year the property was taxed at \$500. Land in Eldon is taxed at only half its estimated value.”

And the defendants were paid \$8.50 for such report and valuation.

The bill further stated that the plaintiffs relying on such report and believing that the property if sold for cash by auction at a forced sale would bring the sum stated therein, advanced McKee \$500, less than half the value as represented to them. And that subsequently default having been made in payment of some instalments and interest, the company in pursuance of the powers contained in the mortgage, after due notice, proceeded to a sale of the property, at Campbell's Hotel, in the Village of Kirkfield, within a distance of two miles of the land, but the highest price offered for the same was \$150, in consequence of which the sale proved abortive. And plaintiffs charged that in fact the property was worth not more than \$200, *“which the defendants well knew, and the said defendant William T. Thompson, in making his said valuation, was guilty either of negligence and gross carelessness, or he fraudulently misrepresented the value of said land to the*

*plaintiff*;" that only about 14 acres were cleared and no portion was free from stumps ; the land very poor and the soil sandy and gravelly, and fully two thirds consisted of swamp utterly unfit for cultivation: that the lot during the year preceding such valuation was assessed for only \$300, not \$500 as stated in the report.

The bill further stated that in February, 1880, the solicitors wrote to the defendants informing them that the company would hold them responsible for any loss sustained, and offering to assign to the defendants the mortgage security and all the interest of the plaintiffs in the property upon payment of their demand. In answer to this proposition of the solicitors, the defendant J. M. Thompson, on the 26th of February, 1880, wrote to them, as follows :

" *Re Wm. McKee.*"

" *Dear Sirs,*—I am in receipt of your favour of 20th inst. in this case.

I have to state that I am of opinion that the C. L. C. Company might do better than look to me for the performance of this person's engagements, and do not see why they are now disposed to do so.

I need only remind you that all classes of security, and properties of this description especially, have greatly depreciated in value since the loan was made, and I regret that my present engagements are such as will not admit of my assuming the control of this property.

Thanking you for the offer made,

I am, dear sirs, yours truly,

J. M. THOMPSON."

The bill prayed an account of what was due to the plaintiffs, and that it might be declared the defendants were responsible to the plaintiffs for the correctness of such valuation, and bound to make good the loss occasioned to the plaintiffs by the misrepresentations contained therein, and the defendants ordered to pay the same, the plaintiffs offering to assign and convey to defendants ; and for further relief.

The defendants severally answered the bill ; the defendant William insisting that his report was substantially true and correct, and also denying all fraud ; the defendant John alleging as follows :

"I had nothing whatever to do with the report and valuation in connection with the loan on mortgage to William McKee in said Bill mentioned, out of which this suit has arisen, beyond merely handing the blank form, supplied for the purpose by the said plaintiffs, to my co-defendant for him to report thereon for the company, in my stead, and when completed forward same to the plaintiffs.

I submit that even should it be established in evidence that my co-defendant was guilty of negligence or fraud in or about the making of the alleged report and valuation, I am not liable to the plaintiffs therefor, and am not chargeable with the damages (if any) sustained by the plaintiffs by reason of any such negligence or fraud on the part of my said co-defendant."

The case came on for the examination of witnesses and hearing at the sittings of the Court in Toronto in the Spring of 1880, before Proudfoot, V. C.

The defendants were both called and examined on their own behalf. The effect of their evidence appears sufficiently in the judgment. The evidence established clearly that the land had been greatly over valued.

At the conclusion of the case the Vice Chancellor dismissed the bill, with costs, on the ground that no fraud was established, and that to entitle plaintiffs to recover, it was necessary to establish fraud.

The plaintiffs appealed therefrom, and the appeal came on to be argued on 20th and 21st days of December, 1880, and again, in consequence of the retirement of Blake, V. C., on the 5th of September, 1882.\*

*McCarthy, Q. C., and Creelman*, for the appellants.

*W. Cassels*, for the respondents.

*Silverthorn v. Hunter*, 2 A. R. 157; *Gowan v. Patton*, 27 Gr. 48, were referred to.

The other facts and the points raised appear in the judgment.

March 23, 1883. SPRAGGE, C. J. O.—The learned Judge before whom this cause was heard proceeded, in my opinion, in dealing with it, upon an erroneous principle.

Between the plaintiffs, and one or both of the defen-

\**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, J.J. A., and CAMERON, J.

dants—a point I will refer to presently—there subsisted the relation of principal and agent. The cases upon which the learned Judge has proceeded, and the principles enunciated in which he has made the ground of his judgment, are none of them cases in which the relation of principal and agent, or any other fiduciary relation, subsisted between the parties, unless the case of *Silverthorn v. Hunter*, 5 A. R. 157, be an exception. They were all cases in which the plaintiff founded his title to relief upon representations made by the defendants, upon the faith of which he had acted, and whereby he had suffered detriment; but none of them cases where the party making the representation owed any duty arising from fiduciary relation to the party seeking a remedy against him.

*Collins v. Evans*, 5 Q. B. 820, was an action by one John Wright, for false representation by defendant that he was the John Wright against whom a writ of *ca. sa.* had issued. The representation was made by plaintiff being pointed out to the sheriff. Held, that the action would not lie unless defendant knew his representation to be false.

*Ormrod v. Huth*, 14 M. & W. 651, was a representation as to quality of cotton sold by sample. Action for false and fraudulent representation. Held, that the action would not lie without representation false to knowledge of seller.

*Thom v. Bigland*, 8 Ex. 725. A representation as to quantity of palm oil on board a vessel. Judgment of Parke, B. No action sustainable unless defendant knew it to be untrue.

*Taylor v. Ashton*, 11 M. & W. 401. Report by directors, if made with fraudulent intent, sufficient to charge defendants, (if plaintiff misled and damnified,) though not known to be untrue by defendants, plaintiff having purchased shares as an investment upon faith of report.

It is manifest that in such cases some of the essential elements of the relation of principal and agent do not exist; *e. g.* the duty of the exercise of due diligence and of knowledge and skill, where the agency is of such a nature as to call for the exercise of knowledge and skill; and where, as

in such cases as the one before us, it is a paid agency, an agency for reward, the agent must be considered, as put by Sir William Jones—*Bailments*, p. 98—as bound still more strongly than if he were a mere mandatory, to use a degree of diligence adequate to the performance of the duty.

In a case decided by me, in the Court of Chancery, *Hamilton Provident and Loan Society v. Bell*, 29 Gr. 203, a case like this, of a loan company against its agent and valuator, I held it to fall within the principles applicable to cases of agency, and the possession, or professed possession, of knowledge and skill in the agent. I referred in that case to *Shields v. Blackburn*, 1 Hy. Bl. 158, and *Jenkins v. Bethem*, 15 C. B. 168. It is clear, from those cases—I particularly refer to the latter—that it is not necessary, in order to fix a paid agent with liability, to establish against him such a case as in the judgment appealed from it was held necessary to establish against these defendants. I have, since the argument of this case, again considered the case that I have referred to in Chancery, and I have seen no reason to change the opinion that I then expressed. It appears to me to be clear that the principles governing the law between principals and paid agents are entirely different from the law applicable to such transactions as were in question in the cases cited in the judgment appealed from.

The learned Judge, in his judgment, has taken up, seriatim, the several objections made by the plaintiffs to the report of the valuator, and deals with them thus. I quote from the judgment: “It might be that he made misstatements in regard to the quality of the soil. If so, he must be responsible for that; but these misstatements must have been made with the fraudulent intention of misleading the plaintiffs.” So as to his report upon the quantity of swamp land, the learned Judge’s conclusion is: “In that I do not see that there is any ground for the charge of fraudulent misrepresentation.” Then, as to the taxes, he says, “Upon that I have had more doubt than most of the

others. Consider the nature of the charge that must be proved against him—that it must be a fraudulent intention in making the answers to the questions.” And in dealing with the answers to the other questions, language of the like import is used.

It thus appears that the learned Judge made fraud on the part of the defendants the test of their liability. There can indeed be no doubt that such was the learned Judge’s view of the law ; for in the earlier part of his judgment, after referring to authorities, he says, they “lay down the general rule of the law to be that the fraud must concur with the false statement to give a ground of action.”

It is possible that the learned Judge would have arrived at the same conclusion if he had considered and disposed of the case upon principles applicable to the relations of the parties. But are we able to say that he would have done so ? He dealt with the case viewing it from a stand point which, in my judgment, was erroneous. His decision might have been different, it is not necessary to say that it would have been different, if he had viewed the case from a correct stand point. If there had been a jury in the case, and they had been directed as to the law of the case as the learned Judge has enunciated the law for his own guidance, there could be no question, I apprehend, (assuming the law to be erroneous,) that a verdict for the defendants would be set aside on the ground of misdirection. Here it may be said that the Judge misdirected himself as to the law. I can see no sound distinction between that and misdirection to a jury.

Mr. Cassels argued very ingeniously, on behalf of the defendant John M. Thompson, that the examination of the land, the valuation and the report having been made by W. T. Thompson, his co-defendant, and the report signed by him in his own name, there was no representation whatever made by John to the company, that all he did was to appoint William to examine, value, and report ; and that the only question, so far as he is concerned, is whether the appointment of William was a proper appointment.

There was a business connection between John and William. They speak of "the office," a place of business, as I understand from their evidence, common to both. There was a written memorandum between them as to their connection, and it does not appear clearly whether or not it was registered under the Partnership Act. They advertised themselves as "Thompson Brothers." and their business as that of "Brokers, money-lenders, valuers," &c. Between themselves they apportioned the work to be done by them; John doing the "office work," and William the outside work, among other things, surveying and valuing land; each being paid, as between themselves, for what was done by him. John was the duly appointed local agent of the company. His account rendered to the company, in his own name, is material upon the question of his liability; and affords also an illustration of the terms of their business connection. One item, \$8.50, is for "valuation and mileage;" that amount was apportioned to William, he having done that part of the work. The other items are for office work, and their aggregate, also \$8.50, was the share of John. The amount of the bill was paid to John, and his receipt in his own name is produced. William, his partner or agent, was, as between themselves credited with \$8.50. If there had been no business connection between the two John would, in my opinion, have still been liable. The maxim, *Qui facit per alium facit per se* would apply. The valuation paper being signed by William makes no difference. He did that portion of the work, and he authenticated it with his signature—a proper thing between himself and John; and it cannot relieve John from liability, for John was the agent of the company for the whole local work in respect to this application for loan. Part of the work having been done by a person with whom he had a business connection certainly cannot relieve him from liability; and he would not be relieved whether the person doing the work was one having business connection with him or not.

No question is made as to the liability of William, if



there was in fact any misfeasance by any one. On the contrary, by his answer he takes upon himself the responsibility of the survey and report ; and vouches for their accuracy, and his own carefulness and good faith in making them. He says, indeed, that they were made in pursuance of instructions received *by him* from the plaintiffs, a position not supported by the evidence.

It remains to consider what, under the circumstances of the case, will be the best course to pursue.

It would be competent for the Court itself to examine the evidence, and see whether, applying to it the law applicable to the case, the judgment should stand or be reversed ; or the cause might be remitted back to the same learned Judge, with the certified opinion of this Court upon the law of the case.

Both these courses would, I believe, be without precedent, and might be attended with inconvenient consequences.

This Court might, if it thought it the best course, look at the evidence in order to see whether upon the simple reading of it it would feel safe in saying that it entitled the plaintiff to a decree. But there is a conflict of evidence ; and we are informed by the judgment of the learned Judge who heard it given, that he thought the evidence of some witnesses, to whom he refers, entitled to more weight than the evidence of witnesses on the other side. It may be that if he had taken what we conceive to be the correct view of the law applicable to the case he might still have decided upon the weight of evidence that the plaintiffs' case was not established, and have so decided properly ; while we, from a mere reading of the evidence, might come to an opposite conclusion. I think, upon the whole, that the safer course for the Court to take is to remit the case to the Chancery Division, in order to its being again carried down to trial. It will be a more expensive course than for this Court to determine the case upon reading the evidence before us, but much more satisfactory, and after all not more expensive than in the case of a trial by jury.

The plaintiffs succeeding upon their appeal are entitled to their costs of appeal, but the new trial should be without costs in the Court below.

The Court directs a new trial, with liberty to the defendants to read the evidence of defendant William T. Thompson, if at the time of the trial beyond the jurisdiction of the Court.

BURTON, J. A.—I am not at all prepared to differ from the learned Chief Justice as to the liability of an agent assuming for reward to undertake a particular duty ; nor do I think that the case of *Silverthorn v. Hunter*, 5 A. R. 157, in this Court, establishes any principle opposed to those which he has laid down as governing the liability of persons owing a duty arising from fiduciary relations.

The head-note in that case is, I think, misleading. In that case Hunter was not acting as the paid agent of the plaintiff, but signed a certificate of valuation, at the request of a person who was acting in that capacity, and it was found by the learned Judge that it was by that person's fraud that the plaintiff was misled.

It was treated throughout as a case of false representation by a stranger who was under no contract, express or implied, with the plaintiffs, and the question in this Court was, whether it could properly interfere with the finding of the learned Judge upon the evidence.

The defendant in that case was paid for his services by the witness McLellan, but it was not pretended that he was the paid agent of the plaintiff; and the learned Judge found that it was by the fraud of this man that the defendant was induced to sign a certificate which contained a statement different from what the defendant swore he believed it contained.

As this case is to go down again for trial, I abstain from expressing any opinion as to the liability of either of the defendants under the circumstances in evidence, although there may be much force in the contention that an agent might not be liable if he employed a competent party and

received a false report from him. These are, however, all matters which may possibly come before us again for decision, and I therefore express no opinion upon them at present.

PATTERSON, J. A.—I concur in the law, and in ordering a new trial, in place of attempting to find the facts; although precedents exist for disposing of the facts.

The appeal should be allowed, *with* costs, and the order should be for a new trial, without costs, as in cases of misdirection.

MORRISON, J. A., concurred.

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## SAYLOR ET AL. V. COOPER.

*Right of way—Way of necessity—Appurtenances.*

C., by indenture conveyed land to S., who owned land adjoining other lands of C., but not the land so conveyed, and by the deed C. stated "I further convey the right of way to cross my land \* \* to the land owned by S., \* \* to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of S., his heirs and assigns for ever."

*Held*, that the words employed in the deed were sufficient to pass the interest intended, and that the right of way was thereby made appurtenant to all the lands of S. there situated; not merely to that so conveyed by C.

The judgment of *PROUDFOOT, J.*, 2 O. R. 398, affirmed.

THIS was an appeal from the judgment of *PROUDFOOT, J.*, reported 2 O. R. 398, where and in the present judgment the facts giving rise to the action are clearly set forth, and came on for argument on the 4th and 5th of September, 1883.\*

*Moss, Q.C.*, for the appellant.

*Bain, Q.C.*, and *Arnoldi*, for respondent.

In addition to the cases cited in the Court below; *Raugeley v. The Midland R. W. Co.*, L. R. 3 Ch. 306; *United Land Co. v. Great Eastern R. W. Co.*, L. R. 10 Ch. 586; *Bailey v. Stephens*, 12 C. B. N. S. 91; *Skull v. Glenister*, 16 C. B. N. S. 81; *Allan v. Gomme*, 11 A. & E. 759, were referred to.

October 6, 1883. *PATTERSON, J. A.*—I shall begin by stating some of the facts which lead up to the questions we have to consider, as I understand them.

Before the year 1865 Robert H. Saylor owned 68½ acres of lot four in the first concession of the Military Tract of the township of Hallowell. His land abutted on the north upon a highway, on the other three sides it was enclosed

\* *Present*.—*SPRAGGE, C. J. O.*, *BURTON, PATTERSON*, and *MORRISON, JJ. A.*

by lands of other people. In or before 1865, I am not sure which, R. H. Saylor conveyed to persons named Gibson the northerly fifty acres, retaining  $18\frac{1}{2}$  acres which were at a distance from the highway, and could only be approached from the highway by crossing the 50 acres.

The Gibsons conveyed the 50 acres to the defendant in 1865—I think in September—and in the same year, 1865, R. H. Saylor contracted to sell to Adam Hubbs Saylor the  $18\frac{1}{2}$  acres, and let the latter into possession, although he did not execute a conveyance to him until 1872.

On 29th December, 1865, the defendant made a deed to Adam Hubbs Saylor, which is the foundation of the plaintiff's claim to the right of way in question, except so far as a way of necessity is claimed. That deed begins in the ordinary form of a deed of bargain and sale, the defendant being the party of the first part, his wife the party of the second part, and Adam Hubbs Saylor, the party of the third part. It is not in the short form. It is witnessed that the party of the first part, in consideration of the sum of \$30, paid by the party of the third part, hath granted, bargained, sold, &c., unto the party of the third part, all his estate, &c., of, in, to, or out of one acre, which is described, and which lay at the northern extremity of the fifty acre tract; and the deed proceeds thus:

“And I further convey the right of way with a team or teams to cross my land from the highway at some convenient place to the land owned by Adam H. Saylor south of the land owned by the first party in the first concession of the Military Tract, being part of lot number four lying south of East Creek, the third party is to make good all damages done to fences gates and growing crops by crossing over said land with team or otherwise.”

These words are written in part of the space left in the printed form, immediately after the description of the one acre. Then the printed form goes on: “Together with all the appurtenances thereunto belonging or appertaining:” with the *Habendum*,

“To have and to hold the aforesaid lands and premises

with all and singular the appurtenances thereto belonging or appertaining unto and to the use of the said party of the third part, his heirs and assigns forever, subject to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown;" and the bar of dower by the party of the second part.

The deed is executed only by the parties of the first and second parts.

The land referred to, as "the land owned by Adam H. Saylor," was the 18½ acres.

Adam Hubbs Saylor is shewn to have used a way over the 50 acres from the high way to the 18½ acres. It appears from his evidence that for the last fourteen or fifteen years the way actually used, which is down the west side of the defendant's land and leads to his buildings, has been in the same place. Before that time it took a slightly different course near the highway, crossing a bridge which then existed, but for which a bridge on the present way was substituted. From the defendant's buildings to the 18½ acres I do not understand there has been any defined way.

Reckoning back fourteen or fifteen years from May, 1882, when the evidence was given, we have the year 1867 or 1868, as the time when the present bridge was probably built, and when therefore the way was used at the place where the plaintiff Adam Henry Saylor attempted to use it when the obstruction of which he complains occurred. No question is made as to the exact *situs* of the way in case the plaintiffs are entitled to the right; but the fact that a defined way had been used for many years may be of some consequence.

Adam Hubbs Saylor continued to use the way until 1880, using it chiefly, if not only, in the winter, as the eighteen and a half acres were woodland, and he used the road to draw wood from them. In January, 1880, he agreed, by deed, to sell to Adam Henry Saylor, "all that part of lots number four and five in the first concession of the Military Tract, township of Hallowell, deeded by Robert H.

Saylor to Adam H. Saylor, and all right and privilege contained in deeds from Freeman Cooper to Adam H. Saylor, for the consideration of \$6,000," payable by instalments extending to 1899, with interest.

I have mentioned that Adam Hubbs Saylor obtained a conveyance of the eighteen and a half acres from R. H. Saylor, in 1872. In the same year he acquired by deed from the defendant five acres adjoining the eighteen and a half acres, and to which he could only have access from the eighteen and a half acres, or from some part of the defendant's land. It is therefore argued that he became entitled to a way over the defendant's land to the five acres, if he had not already a right of way to the eighteen and a half acres.

A question has been made whether the agreement of January, 1880, included the five acres as well as the eighteen and a half acres. The latter parcel was what was described as the land deeded by Robert H. Saylor. If the former parcel was covered, it must be by the words "All right and privilege contained in deeds from Freeman Cooper to Adam H. Saylor." The words "all right and privilege" which are easily applied to the right of way mentioned in the defendant's deed of 29th December, 1865, are not so apt words to describe the parcel of land conveyed by the deed of 20th August, 1872, by which the five acre parcel was conveyed to Adam Hubbs Saylor. But the word "deeds" is used, in the plural, and we know of no deeds but these two. I do not know that we are required to closely criticize the effect of the expression. The deed does not convey the legal estate in any land. It is merely an agreement to sell. According to the evidence, the parties to it put the wider construction on the words, because the vendor put the vendee in possession of the whole twenty-three and a half acres, and he has enjoyed such possession as he has had of this woodland, under the right which both parties to the sale understood that agreement to give him. Whatever his right in equity might turn out to be to the five acres, his legal title to the whole twenty-three and a half acres seems

clearly to be that of tenant at will to Adam Hubbs Saylor, his vendor.

As tenant, to say nothing of his position in equity, he would be entitled to the rights of way which belonged to his landlord, and this right would exist to at least as full an extent with respect to a way of necessity, as with respect to a way acquired by express grant. *Pimington v. Garland*, 9 Ex. 1. And see also 2 Wms. Saund., 368 &c. where the cases of *Blockley v. Slater*, 1 Lutw. 119; *Winford v. Wollaston*, 2 Lev. 266, and other cases are cited, and it is shewn that in an action for disturbance of a way, and in similar actions, a declaration was good which alleged that the plaintiff was *possessed* of a messuage or parcel of land by reason *whereof* he was entitled to the way, without shewing title by prescription or otherwise, and this as well when the defendant was owner of the land over which the way was claimed, as when the action was against a mere wrong-doer.

The deed of 29th December, 1865 operated, in our opinion, to vest in Adam Hubbs Saylor a right of way to his 18½ acres across the defendant's land. Two questions are made as to the effect of this deed. It is attacked as uncertain, because expressed in this part of it in the first person, "I further convey &c."; and it is urged that it does not grant the easement by apt words.

As to the first of these objections—it is not difficult to gather its meaning with reasonable certainty from the document itself. The grantor and grantee are designated in the earlier part of the deed as the parties of the first and third parts; because the party of the first part, who is Freeman Cooper, grants to the party of the third part, who is Saylor, the one acre of land. In the clause immediately in question they are both again designated as parties of the first and third parts, or by the equivalent terms "first party" and "third part," and the latter is shewn by the stipulation as to making good all damage done, as well as by the general tenor of the clause, to be the grantee of the easement. The form of expression, "I further con-



vey," makes this part of the document more like a deed poll than an indenture, but that does not interfere with its operation. The deed, like a deed poll, is executed by the grantor and not by the grantee. The party executing is the same who says: "I further convey, &c."

The word "convey" must, we think, be held in accordance with authority from early to modern times, to be operative to pass the interest in question. When it is said that incorporeal hereditaments lie in grant and not in livery, the meaning is, that they must be conveyed by deed, not that they can only be passed by the use of the word "grant." In *Hewlins v. Shippam*, 5 B. & C. 229; which was cited to us by Mr. Moss, the question was, whether an easement was created by a parol license to construct a drain. The necessity for a deed was what Bayley, J., who delivered the judgment of the Court insisted on, and the authorities referred to by him are upon that point.

In *Holmes v. Seller*, 3 Lev. 305; a covenant was held to amount to a grant of a way.

In 2 Wms. Saund, 283 note (1), and p. 288, note (e), will be found collections of cases illustrating the remark of Levinz, (3 Lev. 372) that "the judges of late years have had a greater consideration for the *passing* of the estate, which is the *substance* of the deed, than the *manner* how, which is the *shadow*."

In *Shove v. Pinke*, 5 T. R. 129; Lord Kenyon said: "It has never been held necessary that the word 'grant' should be used in a grant; it being sufficient if the intention to grant be manifest by a deed;" and Buller, J., said: "First, the thing conveyed is a reversion; that is the subject of a grant; and the words 'limit and appoint' operate as a grant."

I may refer to the judgment of Hagarty, J., in *Acre v. Livingstone*, 26 U. C. R. 288, for a most instructive array of authorities on this subject, collected in support of his opinion that the words "remised, released, and forever quit claimed" in the deed there in question amounted to a

grant. The majority of the Court in that case took a different view from that of Hagarty, J., and from the opinion of the Court in a similar case of *Nicholson v. Dillabough*, 21 U. C. R. 591. We understand that decision however, to have proceeded chiefly upon the consideration that the deed was in form a technical deed of release. Whatever opinion we may entertain on the direct question upon which the different views were entertained in these cases, we do not doubt that in a case like that before us where the deed to be construed is not framed as a release, or as a conveyance expressed in any technical phraseology, all the Judges would have agreed that the intention to grant sufficiently appeared.

In *Fraser v. Fraser*, 14 C. P. 77, the word "assign" was held sufficient to pass the fee, and we see no reason to question the soundness of that decision. It is not, as suggested by Mr. Moss, in conflict with *Moran v. Currie*, 8 C. P. 60, where the words "I assign the within mortgage," were held not to convey the land mentioned in the deed on which they were indorsed.

The word "convey," which is in this deed, is fully as expressive of intention to grant as any of those in the cases referred to.

It is not necessary to place stress upon the habendum to this deed, as it might be if Adam Hubbs Saylor were dead and the question were to arise whether the grant was for longer than his life. But I may say that we agree with the learned Judge in the Court below that there is no reason for limiting the signification of the word "premises," or refusing to read the *habendum* as applying to the right of way as well as to the acre of land which happens to be granted by the same deed.

We agree also with the learned Judge in treating the consideration of thirty dollars expressed in the deed as applicable to the right of way as well as to the acre. It is not only that the evidence does not contradict the *prima facie* import of the deed; it seems to confirm it. If the thirty dollars was a debt, as the defendant says it was,

which he was paying by the conveyance; or if the grantee was to pay him the thirty dollars upon getting the deed; it seems equally clear either way that the grantee had not abandoned his debt, or come under any obligation to pay the money until the deed was executed; and the fact that he insisted upon something more than he may at first have spoken of being satisfied with, as the consideration for his thirty dollars, does not make the additional concession a gratuity.

It seems, again, the same thing whether the grant of the way was a new concession, or whether it was a confirmation of a previous concession from the Gibsons to R. H. Saylor. Either way it was covered by the consideration money.

Then taking the operation of the deed to be what I have indicated, we have a grant of a right of way equivalent to that a form of which is given at the page of Bythewood to which Mr. Bain referred us: 4 Byth. 149.

The circumstance that the same deed conveys the one acre is an accident which in no way affects the grant of the way.

The way being granted from the highway to the land of the grantee, it became appurtenant to that land; and, as already shewn, the tenant, occupying the land with the authority of the legal owner became entitled to the easement. But, in addition to this legal right, Adam Henry Saylor, the original plaintiff, was equitable owner of the land, subject to the charge for the unpaid purchase money. This was clearly the case with respect to the eighteen and a half acres; and we see no good reason to differ from the the opinion of the learned Judge in the Court below, that it was the case with respect to the five acres. Adam Hubbs Saylor was added as a plaintiff to remove any question as to the whole interest in the five acres being represented, the possession by Adam Henry Saylor and the legal reversion by Adam Hubbs Saylor.

It cannot be said that, under the circumstances, Adam Hubbs Saylor is an improper party to the action, although he may not be a necessary party.

The contract to sell to Adam Henry Saylor included in terms the right of way, but that right would, we apprehend, have been included in the agreement to sell the dominant tenement: *Bolton v. Bolton*, 11 Ch. D. 970, per Fry, J.

The result is, that the decree is right, and that the appeal must be dismissed, with costs.

Mr. Bain mentioned an error in drawing up the decree, which may be corrected by erasing the words "by the defendant" from the reference to the dates of the conveyances to Adam Hubbs Saylor.

SPRAGGE, C. J. O., BURTON and MORRISON, JJ.A., concurred.

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## RUSSELL V. CANADA LIFE ASSURANCE COMPANY.

*Life insurance—Warranty—Independent inquiries by Company.*

The manager of the defendant company, entertaining doubts as to the propriety of accepting A. R.'s application for a risk on his life, caused the local agent of the Company to make further inquiries as to A. R.'s habits, &c. On receiving a satisfactory report from the agent a policy was issued.

*Held*, That the defendants were not thereby precluded from relying upon the written application of A. R. and shewing that it contained wilfully untrue statements, the effect of which was by the express stipulations thereof sufficient to avoid the policy.

The judgment of the Court below, in other respects, 32 C. P. 256 affirmed.

THIS was an appeal by the plaintiff from a judgment of the Court of Common Pleas as reported 32 C. P. 256, where the facts of the case and the points relied on are fully set forth, and came on to be argued before this Court on the 22nd of January, 1883.\*

*Bethune*, Q. C., and *McTavish*, for the appellant.

*McCarthy*, Q. C., and *A. Bruce*, for the respondents.

The cases cited appear in the report of the case in the Court below.

June 29, 1883. SPRAGGE, C. J. O.—Each party has put in a synopsis of the evidence taken at the trial, but Mr. Bethune, in his argument, very properly conceded that he could not hope to succeed upon the *facts* of the case, a new trial having been refused by the Common Pleas Division upon the facts as well as the law; and this Court having, just before the argument of this case, refused to interfere with the judgment of the same Court in the case of the same plaintiff against the *Ætna Life Assurance Co.* In both these cases the Court would be the more reluctant to interfere, from the circumstance that they were tried before one of the learned Judges, the Chief Justice, of the Court to which the application for a new trial was made.

\**Present*.—SPRAGGE, C. J. O., HAGARTY, C. J., PATTERSON, J. A., and PROUDFOOT, J.

Mr. Bethune rests his appeal upon other grounds, which may be shortly stated thus :

That the defendants, through their manager Mr. Ramsay, waived any claim that they may have had to avoid the contract of assurance by reason of untrue representations on the part of the deceased made prior to the communications which passed between Mr. Ramsay and Mr. Haycock after the first report of the latter in January. I think this position quite untenable. Certain answers had been made to questions. These answers were representations which it was agreed between the parties should be the basis of the contract which was the subject of negotiation between them. It is immaterial whether these representations amounted to a warranty or not. Mr. Ramsay was aware that one of these answers—the answer that stated that the applicant had been strictly temperate—was not accurate. Knowing that, he was precluded under *Smith v. Chadwick*, 20 Ch. D. 27, and other cases of that class, from setting up that answer as a ground for avoiding the contract ; and that for the very intelligible reason that he did not rely on that false statement as a true one in entering into the contract. This piece of knowledge by Mr. Ramsay may have been, and probably was, his reason for making further inquiry. But I am quite unable to understand how his making further inquiry can be construed into a waiver of anything. There was an agreement, then inchoate—perfected afterwards—an agreement that was *inter partes*, and consisting of several parts. That agreement could only be varied by the agreement of the parties to it. It is true that a party may disable himself by conduct from insisting upon the fulfilment of a contract that has been entered into with him ; or there may be as in *Smith v. Chadwick*, equitable considerations to prevent his recovery.

None of these things existed in this case. There was no agreement whatever between the contracting parties, other than what is contained in the contract itself ; there was no contract on the defendants' part, to disentitle them

to insist upon the contract; nor any reasons legal or equitable to interfere with their right to do so.

The real character of these communications is patent enough. The company's manager is not quite satisfied with the information that he has, and he seeks for more, in order to guide his judgment whether to accept or refuse the risk; he obtains further information and accepts the risk. I cannot see that it is a logical inference that he intended to forego the advantage that the company already had, from that part of the contract which consisted of the representations of the other party to it. It is not a necessary, nor is it a reasonable inference. It would have been simply fatuous if the manager had done this expressly; and there is nothing in what was done from which it can be inferred. And there is besides the difficulty that I have already adverted to, that the applicant for insurance had nothing to do with it.

What I have dealt with is put by the learned counsel for the plaintiff as a substantive ground of appeal. It is also made a ground of appeal that there was misdirection in the learned Chief Justice not putting to the jury the question upon the effect upon the contract of insurance of these inquiries by the manager in the shape propounded by the plaintiff's counsel. I think that there was no misdirection against the plaintiff in the question being put in the shape that it was put: "Did the company after the month of January, 1880, assume the responsibility as to what the habits of Alexander Russell were, if after inquiry by their own agent he was satisfied of their being such that the policy should issue? To this the answer of the jury was: "Yes."

I do not find from the judgments given in the Court below that the effect of this question and answer has been considered in that Court. I should myself have considered it a pure question of law; and not have left it to the jury at all.

But taking it to be a question proper for the jury, what does the finding of the jury amount to? simply this, that

the company did, after January, 1880, assume the responsibility as to what the habits of Russell were; not what they had been, but what they were at some particular time, and that time I take to be the date either of the inquiry or of the application; and that such time and not a former period of his life was meant is apparent from the use of the words, "satisfied of their being such," not "of their having been such." But granting that the question and the answer to it related to his past as well as his then present habits, it was at most to his *habits* only that they related—and the question would be, what was the proper judgment upon the findings, whether they were such, apart from the finding as to the habits of Russell, past and present, as to make a judgment for the defendants proper.

Rule 321 of the Ontario Judicature Act seems to apply to this case. The application in the Court below, after judgment for the defendants by the learned Chief Justice who tried the cause, was for a new trial. The portion of the rule that applies is as follows: "Upon a motion for judgment, or for a new trial, the Court may, if satisfied, that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly."

The Court below was satisfied that upon, and in, the findings of the jury, it had before it all that was necessary under the rule for determining the question in dispute, and gave judgment accordingly, and in that was right.

I think that there was no misdirection in the Judge telling the jury that if a man made an untrue representation as to his habits, whether they were temperate or otherwise, his representation must, if untrue, be wilfully untrue. It was the Judge's opinion upon a matter of fact, not indeed of a fact proved in the case, but rather the reasoning, the conclusion of the Judge as to a question of fact, from a fact proved in the case. It is clear that it is not misdirection for a Judge to give his own views as to the effect of evidence, though his views may be erroneous,



and in this case he appears to have been particularly careful to explain to the jury that they, and not he, were the judges of the facts of the case. The law upon this point is laid down distinctly in *Dougherty v. Williams* 32 U. C. R. 215, in which views of several English Judges are given. This was affirmed in *Regina v. Port Perry*, 38 U. C. R. 445 ; and *Regina v. Wilkinson*, 42 U. C. R. 505.

In my opinion the learned Judge did not err in allowing the amendment asked for by the defendants. I entirely agree with the judgment of Mr. Justice Galt upon the point.

I think the learned Chief Justice has satisfactorily shewn that there is no real inconsistency between the answer of the jury to the fifth and their answer to the twelfth question. I think that transposing them will shew this clearly. Mr. Russell's answer to question twelve that he had never had, and was not predisposed by hereditary tendency or otherwise to apoplexy, or any disease or affections of the head or nervous system, may have been true ; and yet it might be true that he did wilfully withhold from the company the communication and information that he had been in Belmont Retreat as a patient for nervousness and sleeplessness. The answers involve certainly the apparent inconsistency that he had never had any disease or affections of the nervous system, and yet had been in Belmont Retreat to be treated as a patient for nervousness as well as sleeplessness, and the jury do find that the deceased did wilfully withhold from the company the fact that he had been in the Retreat to be treated as a patient for the ailments named. And that what he so wilfully withheld was information as to a material fact which he was bound to communicate can admit of no question. One term of the policy is " that in case any fraudulent or wilfully untrue material allegation be contained in the said received declaration ; or (which relates particularly to the point in question) if it shall hereafter appear that any material information has been wilfully withheld, or that any of the matters set forth have not been truly and fairly stated, then this policy shall be void," &c.

I think a reference to cases upon this point unnecessary but a decision of that very eminent Judge the late Master of the Rolls is so apposite that I will refer to it. It is the case of *London Assurance Co. v. Mansel*, 11 Ch. D. 363. There was not in that case any distinctly false answer to the question put by the Life Assurance Company. Part of the question was left unanswered, and the answer that was given was misleading; and it being as to a fact which it was material for the company to know Sir George Jessel held the case to be a very plain and clear one, and declared the policy void.

Now assuming for the moment that the answers by the jury to these two questions are not perfectly reconcilable, what effect should that have upon the verdict, or upon the judgment that ought to be given upon the verdict? These questions 5 and 12, and the answers to them, may be discarded, and sufficient is left without them, and without the question as to the habits of the deceased, to sustain the verdict and judgment. I think that Rule 321, which I have quoted, applies again here. The Court below was satisfied that it had before it all necessary materials for determining the question in dispute, and that the findings of the jury upon questions 5 and 12 ought not to lead to a verdict for the plaintiff, and they determined the question in dispute accordingly, and in that they were in my opinion right. I think the appeal should be dismissed with costs.

HAGARTY, C. J. — The principal point pressed on us by Mr. Bethune appeared to me to be the finding of the jury on the question number fourteen.

“Did the company after the month of January, 1880, assume the responsibility, as to what the habits of Alexander Russell were, if after inquiry by their own agent he was satisfied of this being such that the policy should issue.”

I hardly understand the precise meaning of the latter part of this question as printed in the Appeal Book.

I presume it to be based upon the plaintiff's replication (32 C. P. 260.) A demurrer was filed to this.

In my opinion that replication is clearly bad in law, and is no answer to the pleas to which it is applied.

It is meaningless unless it amounted to an assertion that the defendants waived the written terms and conditions on which they entered into the contract.

I also consider that no evidence whatever was before the Court to support any such assertion.

I do not think I should have thought it right to put any such question to the jury, and their answers to it ought not in my judgment to affect the decision.

I am wholly unable to accept the view so strongly pressed upon us.

A man makes certain most material statements to a company as to his state and habits. He gets one or more friends to support him in such statements. They are agreed to form the basis of the proposed contract. The company hesitates as to finally accepting them as sufficient. They direct their agent to make further inquiry on the subject, he does so and reports most favourably on the risk. This decides them and they accept it. It matters nothing in my view that but for the subsequent inquiries they would not have accepted.

I cannot understand how in any view of the case this can in any way prevent the company from still insisting on the written representations of the assured and his friends, and then holding him to the correctness thereof. I should have thought their right so to do to be too plain for serious argument.

A man may propose to another to enter into a contract, making certain strong assurances and agreements to induce him so to do. The other somewhat distrusts him, and delays deciding till he has made inquiries as to the truthfulness of the other's assurances.

As the result of the inquiries he decides to accept the offer. Can it be possible that he is therefore barred from afterwards insisting on his opponent being bound by

and held to the state of facts which he proposed to the other as the basis of their dealing?

It is also objected that there is no express finding by the jury that the matters found against plaintiff were material. This is in the reasons of appeal, but it does not appear in the rule to shew cause in the Court below.

The learned Chief Justice of the Common Pleas in his judgment, (p. 280,) very fully answers this. I quite agree with what is there said, and I adopt the statement.

We find the jury here finding that Russell's answer was not true and faithful as to his being temperate as to the time preceding his application.

That within a year before the application he was addicted to the immoderate and intemperate use of intoxicating liquors.

That he wilfully withheld that information from the company.

That he wilfully withheld the information that he had been in the Belmont Retreat, (described as intended for inebriates,) as a patient for nervousness and sleeplessness.

That his answers to questions 6 and 7, as to name of his usual medical attendant, and that he had been attended for no serious illness, were untrue and wilfully untrue, and that he wilfully withheld information respecting these matters from the company, and that they were material matters to be stated by him.

That it was wilfully untrue when he stated that he did not require any professional assistance for any disease or personal injury, and that he wilfully withheld that information from the company, and that it was material to be stated by him.

When we read the contract between the parties and the answers given by the applicant and his friends to the questions, and the findings of the jury already stated, we must be satisfied that it is impossible for plaintiff to recover if such findings be based on sufficient evidence.

It was hardly, if at all, urged before us that there was not sufficient evidence to warrant the findings.

The findings in favor of plaintiff may be thus summarized.

That at the time of the application Russell was temperate.

That he was not a patient in an inebriate asylum as an inebriate from drunkenness.

Number eight. That his answer was true when asked as to any other medical attendant, and he said "none."

Number twelve. That his answer as to hereditary tendencies to apoplexy, or affection of the head, or nervous system was true.

And number fourteen. As to the company assuming responsibility, which I have already discussed.

It of course seems logically an excellent thing to get the jury's opinion on every point raised in the case, and on every possible view suggested by the ingenuity of counsel.

But to any one conversant with the practical working of the jury system and fairly appreciating its excellencies and its defects; I think the conviction must present itself that very formidable difficulties seem to have arisen from the modern practice of requiring them to answer a large number of questions, with the common result of finding some real or apparent incongruity between some of their answers. When anything of this kind occurs it is naturally magnified by the party against whom the general result is unfavourable, and great additional difficulties are thrown in the way of litigants.

To compel a jury to give reasons for any verdict at which they arrive would naturally be fatal to the system. I fear very much that if we attach too much weight to any apparent incongruity or inconsistency, or insist too rigidly on perfect consistency in a large number of findings we are adding fresh pitfalls to the path of suitors.

We find in this case the material points of defence established beyond reasonable doubt.

I see no reason to give effect to any of the objections pressed on our attention by the able counsel for the plaintiff.

I think the judgment of the Court below is right, and the appeal should be dismissed, with costs.

PATTERSON, J. A., and PROUDFOOT, J., concurred.

ARCHER V. SEVERN.

*Will, construction of—Devise to creditor—Satisfaction.*

The testator by his will, made in July, 1877, devised to his son G., certain real estate and brewery, expressing that "this devise be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause, "L," the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of \$36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell part of the lands devised to him, including the brewery, to G. for \$27,000, and the brewery plant for \$6,987.20, which was credited on G.'s claim against the testator. G. subsequently, under clause "L," claimed against the estate of the testator payment of the amount for which the brewery premises and plant were sold, he swearing that he was ignorant of the contents of the will. Thereupon the plaintiffs, two of the executors and trustees, instituted proceedings seeking to obtain a construction of the will:

*Held*, (reversing the judgment of the Court below), that the agreement entered into between the father and son superseded the devise to the son.

THIS was an appeal from a judgment of Ferguson, J. The action in the Court below was instituted on the 22nd March, 1881, by William Henry Archer and William Booth against George Severn, Mary Davidson, Elizabeth Pannell, Annie Hudson, Jane Hudson, Sophia Atkinson, Henry Severn, and William Severn, for the purpose of obtaining the construction of the will of John Severn, deceased, the plaintiffs and the defendant George Severn being the executors and trustees named therein, and who had duly proved the same.

The defendants were children, and devisees of John Severn.

The testator died on the 8th of February, 1880, having duly executed his will, dated 26th July, 1877.

By the second clause of his will the testator provided as follows:

"(B.) I devise all the lands situate in said village of Yorkville, and particularly described in the first schedule hereto, unto my son George, his heirs and assigns, together with their actual and reputed appurtenances, or with the same or any part thereof held, used and occupied, or enjoyed or known, taken or considered as part or parcel thereof, together also with all and all manner of engines, fixtures, utensils and implements, and the appurtenances and stock-in-trade therein, or in or about the premises at my decease, he or they paying in exoneration of any other estate any encumbrances which at the time of my decease shall affect the same, and this devise to be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease."

By a subsequent clause (clause L) of the will the testator provided as follows :

“ And it is my will and desire that if at any time between the day of the date of this my will and the time of my decease, any sale or other disposition of any or the said lands and premises herein specifically devised by me shall be made by me, the consideration money received therefor in money or otherwise, to the amount thereof or the value thereof, shall be a charge upon the whole of my real estate, and shall become due and payable to the devisee to whom the said land is herein specifically devised, or to his or her heirs, executors, administrators, or assigns, within five years after my decease, with interest after the first year of my decease ; the securities (if any) received in part or whole payment of such consideration, if in being at the time of my decease, to be transferred, conveyed and assigned to the said devisee, his or her executors, administrators or assigns, and to be by him, her or them received as to the amount then owing thereon, in part or in whole payment of the said consideration money as the case shall be,”

The bill further stated that previous to the death of the testator an accounting took place between him and the defendant George Severn, when it appeared that the testator was indebted to George in a sum exceeding \$36,000, and in the month of October, preceding the death, it was agreed that the testator should sell to the defendant George Severn, the brewery, and brewery plant, stock, &c., for \$33,987.20, in all ; which was subsequently carried out and consummated by a decree of the Court of Chancery, by the terms of which George Severn was to be at liberty to collect the outstanding accounts, and book debts due the testator in connection with the brewery business, until sufficient was collected to discharge the balance due George Severn, after crediting the said \$33,987.20.

The bill further stated that the defendant George Severn claimed to be entitled under the provisions of the said clause L to a charge in his favour upon all the other lands of the testator, to the extent of the price realized by the testator from the sale of the brewery property, which by clause B of the will had been devised to the said defendant, and that the other devisees named in the will contested this, and therefore the plaintiffs prayed the Court to construe the will and determine the rights of all parties thereunder.

The action came on to be heard on the 9th and 10th of February, 1882.

After taking time to look into authorities his Lordship on the 13th of February, 1882, gave judgment in favour of the claim of George Severn ; costs of all parties to be paid out of the estate (a). The defendant Elizabeth Parmell appealed from that judgment, and the appeal came on to be argued before this Court, on the 7th and 8th days of March, 1883.\*

*Moss*, Q.C., for the appellant.

*Rose*, Q.C., and *J. H. McDonald*, for the respondents Atkinson and Hudson.

*S. H. Blake*, Q.C., for George Severn.

*W. Cassels*, for Archer and Booth.

*R. N. Miller*, for other parties.

On behalf of the appellant it was contended that by the terms of clause B in the will, George Severn was compelled to release all his claims against the estate: and having been appointed an executor of, and having proved the will, he was bound to carry out the trusts, bequests, devises, and all other provisions contained therein. He could not be heard to say that he renounced the property mentioned as "The Summer Hill," property in the will, and then assert a claim against the estate contrary to the terms of the will.

(a) The following is the portion of the judgment bearing on the point in issue:

"Since the conclusion of the argument I have reconsidered this case, and am now of the same opinion as then. I cannot perceive that there is any proper construction of the will but that contended for by the defendant George Severn. I am of the opinion that the fact that the purchase was by him from his father, the consideration being a portion of the debt owing by his father to him, cannot make any difference as to the way in which clauses B and L of the will should be construed, and that the defendant George Severn is entitled under the provisions of the will to a charge upon the estate to the extent of the amount of the purchase money, settled and fixed between him and his father, somewhat over \$33,000, and that he is entitled to prove against the estate for the balance of his debt, being between \$2,000 and \$3,000. He offers, however, to take a conveyance of the property known as the Summer Hill property in lieu of this latter sum, and if this offer is accepted that amount will be, of course, settled."

\**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.



The conveyance to George of the brewery property, operated as a satisfaction of the devise to him in clause B, to the extent of the value thereof; and it is not to be supposed that the testator intended to give to George all the property devised by the will, and that he should still be able to recover his claim against the testator's estate. Such a construction would defeat the intention of the testator, and render nugatory the intended benefits in favour of the other objects of his bounty named in the will.

The respondents, other than George Severn and the executors, in addition to the points raised by the appellant, contended that in any event, the charge made by George Severn, should be reduced to \$27,000, the sum for which it was agreed the brewery should be sold, and that it was plain from the provisions contained in clause D, that the object of the testator was, as far as possible, to keep the several devisees in the same positions as they would have been, had his death occurred shortly after the execution of his will, and without any material change in the state of his affairs.

The executors submitted to act as the Court should direct and alleged that they had been advised they could not safely proceed to a distribution of the estate, until the adverse views of those beneficially interested under the will were determined.

The respondent, George Severn, insisted that the sale by the testator to him was *bonâ fide*, and he contended that he was entitled to a charge on the estate for the amount of the consideration received by the testator, within the meaning of clause L, and that this position was not affected in any way by the fact that the sale was by the testator to him, and that he was still willing to accept in full discharge of his claim against the estate due at the death of the testator, that portion of the real estate devised to him, called the "Summer Hill Estate," and which remained undisposed in any other way at the time of the testator's decease, and that in this he was claiming not adversely to the will, but under the strict terms thereof.

October 6, 1883. SPRAGGE, C. J. O.—The bill in this case is filed by the executors and trustees of the will of the late John Severn, asking for the construction of his will.

The date of the will is, 26th July, 1877.

Clause B of the will is a devise to George Severn of certain lands, according to a schedule. First of what is called the "Summer Hill Estate;" next of five parcels of land, which together appear to comprise the brewery property. The clause also comprises all appurtenances and stock-in-trade in or about the premises at his death, George paying off incumbrances; and provides, "and this devise to be accepted by, and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." The inference from this is, that the testator contemplated the existence of a claim by George against his estate; but that it would be of less amount than the value of what was devised to him; and therefore that he was conferring a benefit; and expected that it would, and provided that it should, be accepted in discharge of such claim. It could not be accepted otherwise than *cum onere*.

Clause L provides for the event of the testator selling lands specifically devised—those above devised to George, and those devised to daughters; and the purpose to be effected was to substitute the proceeds of the lands that might be so sold for the lands in specie. The process by which he proposes to effect this is by charging the proceeds of sale against the whole of his real estate, and making the amount of such proceeds payable to the specific devisees respectively. If at the time of his decease any portion of the purchase money—proceeds of a particular devise remained in the shape of securities, the particular devisee to have such securities.

In regard to the lands and premises devised to George the testator did that which he contemplated and provided for doing by clause L. He did make sale of those lands, but not, I should say, in the mode that he contemplated.

What he provided for was a sale to some third person, what he did as to that specific devise was to sell to the devisee himself.

On the 8th of October, 1879, the testator and George entered into an agreement, after a taking of accounts between them; the result being, that the testator was found indebted to George in \$36,145.86. The agreement was, that the brewery property should be sold by the intending testator to George for \$27,000, which sum should be credited on the indebtedness, and the plant and stock to be taken by George at a valuation. The terms of the agreement seem to import that it was expected that this valuation would turn the scale in favour of the testator, for it provides stringently for the payment of a balance by George. The result however was a valuation of the plant and stock at \$6,987.20, leaving a balance in favour of George, of a trifle over \$2,000. The Summer Hill property devised to George was not noticed in this transaction.

The next thing that we have in the case is a suit in the Court of Chancery by George against the testator to carry out this agreement. At that date the mental condition of the defendant was such that a guardian *ad litem* was appointed on his behalf. The result was, a decree for specific performance of the agreement, and that George should be at liberty to collect the outstanding accounts due to the testator on account of the business, so far as might be necessary to pay the balance due to him, and certain charges and expenses connected with the transaction. George alleges that all this time he was ignorant of the contents of the will.

It is said on behalf of George's claim that the testator intended, by the devise to him, to confer upon him a great benefit; and believed when he was making his will that it would have that effect; and evidence is given that before his settlement with George he valued that which he devised to him, (whether with or without the Summer Hill property is not very material) at \$60,000, and supposed that his debt to George was about \$17,000. If he

had sold to a third person for his estimate of value, George would have received a large benefit, though from the largeness of his own debt the benefit would have been much smaller than was intended by the testator. If he had sold to a third person at the price realized on the sale to George, George would have received no benefit under the will. The figures shew this. Taking the proceeds of the sale at, in round numbers, \$34,000, the estate would be charged with that amount in his favour, but that could only be "accepted" by George if taken in full discharge of his claim upon the estate of the testator, unless the words "at the time of my decease" make a difference—the words of the will being, "and this devise to be accepted by, and to be in full discharge of any and every claim he (George) shall have against my estate at the time of my decease." There can be no room for doubt, as well from the terms of the will, as from the evidence of Mrs. Wilson, a witness called by George, that the claim spoken of in the will is the claim of George, which was settled by the arrangement of the 8th of October, 1879, between George and the testator. The testator intended the acquittance of that debt by either George receiving the land devised to him in specie, or receiving the proceeds of its sale, if sold by the testator himself. The acquittance of the debt is in short made a condition of the devise. George was put to his election; he had the alternative of taking the devise, and discharging the debt, or retaining the debt, and not taking the devise.

Now what was contemplated by the testator, to occur and to be done, as to both the debt and the land devised, after his death was done by the testator and George during the life time of the testator (save as to the Summer Hill property, which for all practical purposes may be put out of the case.) The land and the debt were one against the other. It can, I conceive, make no difference in that respect that the value of the land was less, and the amount of the debt greater than they were supposed to be by the testator when he made his will. Both debt and land were

by the act of the parties withdrawn from the operation of the will.

Certainly, the land, as land which the testator could devise, ceased to exist. But it may be said that its ceasing so to exist is provided for by the will; but again, when we look at the provision made by the will, for its ceasing so to exist, we find provision made in relation to that which was to represent the land when sold—a charge in favour of the devisee of the land upon the whole real estate of the testator, of the proceeds of the sale, payable five years after his death, with a transfer to the devisee of securities, if any, taken for the payment of purchase money.

This agreement between the testator and George differs so widely from what was contemplated by the will, that it can scarcely be regarded as done in pursuance of the will, but rather as an independent agreement made between a debtor John Severn, and his creditor George Severn, that the brewery premises owned by John should be given by him and accepted by George as a satisfaction *pro tanto* of the debt due by the one to the other; and this view of the case is fortified by the fact sworn to by George in his answer that he was unaware of the devise in his favour by the will of John. It is certain that the testator did not intend upon the sale to George that his estate should stand charged with the amount of the purchase money. He had in fact received the purchase money by the acquittance *pro tanto* of the debt. The two things are inconsistent, yet this is what is claimed by George in his answer. It is in fact the only shape in which he could put his claim, the land itself having reached his hands by purchase under the agreement of October.

It is to be remembered that after all we are interpreting the will of John Severn. The terms of the will make it certain that the testator did not intend that the devisee should take the land as a free gift, an act of bounty, leaving the debt from himself to George still subsisting, and there is no room to doubt the identity of the debt paid by the testator by the conveyance, with the debt referred

to in the will as to be acquitted by the acceptance of the devise. George now seeks to have the land, without the debt being set against it; or it may be put thus: Having got the land, and by getting it received payment of his debt, as was contemplated by the will (whether he knew of the provision to that effect in the will is immaterial)—he now seeks that which represents the land, the consideration for its sale. The testator intended that he should have one or the other, not both.

The sale of the subject of the devise would necessarily be a revocation of the will *quoad* that devise; and this would be so since the Wills' Act, as it was before; the second section only applying to cases where the testator has the power to dispose of the land devised at the time of his death. Mr. Jarman, 4th ed., p. 162, says this; and it could not be otherwise. Then does the clause for substituting the proceeds of lands sold for the land itself help the claim of George? I have already explained why I think that it does not: that the agreement of October was not in pursuance of that provision of the will. In very few words my opinion is, that the testator intended by that agreement, and what was done under it, to supersede the devise to George, and that what he did was effectual to that purpose.

Interpreting the will by the surrounding circumstances at the two material dates—the date of his making his will and the date of his carrying out the agreement of October—the conclusion seems to me inevitable, that there was intended to be a revocation of the devise to George Severn.

Appeal allowed: costs of all parties out of the estate.

BURTON, PATTERSON, and MORRISON, J.J.A., concurred.

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A DIGEST  
OF  
ALL THE REPORTED CASES  
DECIDED IN  
THE COURT OF APPEAL,  
CONTAINED IN THIS VOLUME.

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**ABANDONMENT.**

*See* DISTRESS DAMAGE FEASANT

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**ACCIDENTAL FIRE.**

*See* PLEADING, 1, 2.

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**ACCIDENT TO EMPLOYÉ, 1.**

*See* RAILWAY COMPANY.

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**ACCOMMODATION NOTE.**

The defendants made a note for \$200, to one M., to assist M. in retiring paper in which defendants were interested. M. discounted his own note for \$200 with the plaintiffs, depositing with them the defendants' note as collateral. When M.'s note fell due, the defendants' note being then overdue, he paid \$25 and gave a renewal for \$175, leaving defendants' note with the plaintiffs:

*Per* WILSON, C. J.—Defendants' note was not an accommodation note: but assuming it to be so: *Held*, that the proper inference from the evi-

dence was that it was transferred to the plaintiffs as security for the debt represented by M.'s note, not for that note specially; and that the defendants remained liable. *The Canadian Bank of Commerce v. Woodward et al*, 347.

*See* also PRINCIPAL AND SURETY.

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**ACCOUNTS.**

*See* RAILWAY COMPANY, 2.

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**ACTION FOR NOT ACCEPTING  
IRON OF A DIFFERENT  
BRAND FROM THAT  
AGREED FOR.**

*See* AGREEMENT, &c.

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**ACT OF GOD.**

*See* PLEADING, 1, 2.

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**AFFIDAVIT OF DEBT.**

*See* CHATTEL MORTGAGE, 2.



**ADVANCE TO DEBTOR BY  
GUARANTOR BEFORE DE-  
FAULT.**

*See* GUARANTY, &c.

**AGENTS AND SUB-AGENTS,  
APPOINTMENT OF.**

*See* INCORPORATED FOREIGN CO.

**AGENT BUYING.**

*See* LAND TAX, 2.

**AGREEMENT TO PURCHASE  
CERTAIN BRAND OF IRON.**

The defendant company agreed to purchase from the plaintiff a quantity of iron called "Depere" iron, the plaintiff to deliver the same as the defendants should require for their works. The plaintiff subsequently without any requisition from the defendants shipped to them nearly the whole quantity agreed for, of another brand of iron, manufactured by a different company, though using the same ore and fuel and making the same grade of iron as the Depere Company. The defendants refused to accept the iron offered:

*Held*, (affirming the judgment of the Court below, 31 C. P. 475) that the defendants were not bound to accept the iron so tendered, neither could the plaintiff recover the value thereof, the iron being a different article from that contracted for. *Hedstorn v. Toronto Car Wheel Company*, 627.

**ALTERATION OF ACCOUNTS.**

*See* EXTRADITION, 1.

**AMENDMENT.**

*See* PLEADING, 2.

**APPEAL, LEAVE TO.**

*See* JUDICATURE ACT, 2.

**APPEAL, MODE OF ENFORC-  
ING JUDGMENTS IN—**

The proper way of enforcing a judgment of the Court of Appeal is to have the judgment of the Court below amended, if necessary, according to the judgment in appeal; and when amended to issue process thereon.

Sec. 44 of the Appeal Act, R. S. O. ch. 38, is not superseded by sec. 14 of the O. J. A.

*Lowson v. The Canada Farmers' Mutual Ins. Co.*, 613.

**APPEAL ON QUESTIONS OF  
FACT.**

The rule generally followed by the Courts is not to review the finding of the Judge of first instance, where his decision depends upon a balance of testimony; still if the Court in *banc* upon an application to it has reversed that finding, this Court must be satisfied upon appeal, that the Court in *banc* was wrong before it will interfere with that judgment. *Hale v. Kennedy*, 157.

**APPOINTMENT, FRAUD ON  
POWER OF—**

*See* WILL, 2.

**APPURTENANCES.**

*See* RIGHT OF WAY.

**ARBITRATION, AGREEMENT  
TO SUBMIT TO.**

1. One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named should appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party.

A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, on the agent of the plaintiff company in New York, and on the 19th the plaintiff company, by cablegram from London, named one C. M. D., of New York, as their arbitrator. On the 28th of the same month S., the arbitrator of the defendant company, wrote to C. M. D., requiring him to join in the naming of an umpire; but he answered that he was about to leave the city, and would return on the 30th., and that having been only advised by cable of his appointment and that his commission would be mailed to him, he could not until its arrival intelligently take any action. On the 30th C. M. D. returned to his office, and then wrote to S. expressing his readiness to act, and at the same time confirmed the nomination made by his partners, during his absence, of an umpire.

*Held*, [affirming the decree of the Court below], (1) that the facts did not establish any refusal or neglect on the part of C. M. D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead; (2) that the naming by the arbitrators of an umpire, was not such an act as required C. M. D. to take part in within ten days from his appointment, or in default that his appointment should be vacated, and S. have the right to name a substitute. *The Direct U. S. Cable Co. v. The Dominion Telegraph Co. of Canada*, 416.

2. The defendants also set up by way of defence and as a ground of demurrer to the plaintiffs' bill to restrain proceedings by the alleged arbitrators, the pendency of another action in New York for the same purpose; but, *Held*, that this could only form a ground for application to stay proceedings, or to compel the plaintiffs to elect between the two tribunals; and, *Semble*, that under the circumstances set out in the case it could not be taken advantage of in any way. *Ib.*

3. The agreement for submission contained a clause that it should be made a rule of the Court of Queen's Bench in England, and all proceedings thereunder should be governed as in Great Britain by the provisions of the English C. L. P. Act:

*Held*, that this formed no objection to the jurisdiction of our Court of Chancery. *Ib.*

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**ARBITRATOR, NEGLECT OR  
REFUSAL TO APPOINT.**

*See* ARBITRATION, &c., 1.

## ASHBURTON TREATY.

*See* EXTRADITION, 1.

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## BALANCE OF CLAIM.

*See* DIVISION COURTS, &c.

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## BANKING.

*See* TRADE AND COMMERCE.

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## BILL OF SALE.

*See* HUSBAND AND WIFE.

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## BILL STAMPS.

*See* STAMPS.

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## BONA FIDES.

*See* HUSBAND AND WIFE.

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## CHANGE IN CHARACTER OF RISK.

*See* FIRE INSURANCE.

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## CHANGE OF POSSESSION.

*See* CHATTEL MORTGAGE ACT, 1.—  
INTERPLEADER — HUSBAND AND WIFE.

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## CHATTEL MORTGAGE.

1. B., a dry goods dealer at Ottawa, consigned his stock in trade to S. S. & Co., auctioneers in Toronto, for sale, the proceeds to be applied (1st) in payment of \$800 advanced B. by S. S. & Co.. and (2nd) in pay-

ment of \$250 advanced by McC. & Co. After the goods had reached the warehouse of S. S. & Co., B. gave other orders on the proceeds, which they accepted conditionally. After the sale had been advertised, but before the day appointed for selling, the sheriff levied on the goods under an execution sued out by the defendants who, on ascertaining the nature and amount of S. S. & Co.'s claim, paid the same to them, and the sale by arrangement was allowed to proceed, the amount realized therefrom being paid into the hands of the sheriff, who should hold the same until the rights of all parties were ascertained. The sheriff thereupon caused the several claimants to interplead.

*Held*, affirming the judgment of the Court below, 31 C. P. 320, [ARMOUR, J., dissenting.] that the several orders on S. S. & Co. operated as equitable assignments of the goods or their proceeds; that the consignment to S. S. & Co., was as complete and continuous a change of possession as under the circumstances it was possible to effect; that therefore no necessity existed under the Chattel Mortgage Act for registering the orders, if that could be done; and that the defendants having by their payment to S. S. & Co. been subrogated to their rights, were entitled in priority to all the other claimants to rank upon the proceeds for the sum so advanced. *McMaster et al. v. Garland et al.*, 1.

2. In November, 1881, a chattel mortgage was made to secure the plaintiff as indorser of a promissory note of the mortgagor, dated 4th October, 1881, at two months. A recital in the instrument stated that it had been given "as security to the

mortgagee against his indorsement of said note, or any renewal thereof that shall not extend the liability of the mortgagee beyond one year from the date thereof; and against any loss that may be sustained by him by reason of such indorsement of said note, or any renewal thereof." The affidavit stated it was made "for the express purpose of securing the mortgagee against the payment of such his liability for the said mortgagor by reason of the promissory note therein recited or any future note or notes which he may indorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise."

*Held*, [reversing the judgment of the Court below,] that as the mortgage itself was good, and the affidavit covered all that is required by the Act, that part of the affidavit from "or any future note" to the end was unnecessary, and could not vitiate the security. *Keough v. Price*, 27 C. P. 309 remarked upon. *Driscoll v. Green, et al.*, 366.

See also HUSBAND AND WIFE.

### CHATTELS.

*Sale of.*]—See INTERPLEADER.

### COGNOVIT.

The plaintiff was suing the defendant F., who was in insolvent circumstances, when the defendant, M., applied to him, and by threats of action to enforce his claim, and a promise to give time to F. if he acceded to his request, induced F. to execute a cognovit whereby M. obtained priority over the plaintiff. Both parties placed writs of execu-

tion in the sheriff's hands. Under that, at the suit of M., the goods of F. were sold, M. buying part thereof, the price of which he retained on account of his judgment and received the balance from the sheriff.

*Held* [reversing the judgment of the Court below, 3 O. R. 499], that the cognovit was collusive and void under R. S. O. ch. 118, sec. 1, and the amount realized at the sale by the sheriff was properly applicable to the plaintiff's writ.

*Held*, also, that a judgment for payment by M. to the plaintiff of the proceeds of the sale could properly be made in this action. *Martin v. McAlpine et al.*, 675.

### COLLUDING CREDITOR, REMEDY AGAINST.

See COGNOVIT.

### COLLUSION.

See COGNOVIT.

### COMPENSATION FOR DEFECTS IN PROPERTY SOLD.

See VENDOR AND PURCHASER.

### CONSTITUTIONAL LAW.

See RAILWAY COMPANY.

### CONTRACT.

See VENDOR AND PURCHASER.

**CONTRACT NOT UNDER SEAL***See* MUNICIPAL CORPORATION.**CONTRIBUTORY NEGLIGENCE.***See* NEGLIGENCE, 1.**CONVEYANCE.***See* VESTING ORDER.**COURT OF APPEAL EQUALLY DIVIDED, EFFECT OF.***See* EXTRADITION, 3.**DEATH WITHOUT ISSUE.***See* WILL, 3.**DELAYING CREDITORS.***See* FRAUDULENT CONVEYANCE.**DEBTS DUE BEFORE APPOINTMENT OF RECEIVER.***See* RAILWAY COMPANY, 2.**DEMURRER.***See* PLEADING, 1, 2.**DEVISE TO CREDITOR.***See* WILL, &c., 5.**DIAGRAM BY AGENT AFTER INSPECTION.***See* INSURANCE.**DISCHARGE OF SURETY.***See* PRINCIPAL AND SURETY.**DISTRESS DAMAGE FEASANT.**

Defendant seized the plaintiff's oxen damage feasant in his wheat field, but being unable to find a pound-keeper, turned them loose near the plaintiff's gate. On the evening of the same day the defendant again seized them for doing damage to his meadow and impounded them, giving a statement of his claim for damage to the wheat, but making no claim for injury to the meadow.

*Held*, that the damage to the wheat had been abandoned, and that the impounding and sale of the oxen for the damage so claimed were illegal.

The plaintiff forbade the sale, when defendant told the pound-keeper to sell and that he would be responsible :

*Held*, that the defendant and pound-keeper were both liable.

*Spafford v. Hubbell*, M. T. 2 Vict., R. & J. Dig. Col. 1517, explained. *Buist v. McCombe et al.*, 598.

**DIVISION COURTS, JURISDICTION OF.**

1. Where the original demand, no matter how large, is ascertained by the signature of the party liable, and a balance not exceeding \$200 remains due, the Division Courts under the Act of 1880 have jurisdiction. *Bank of Ottawa v. McLaughlin*, 543.

2. By the Division Courts Act, 1880, those Courts have jurisdiction in actions for a debt, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant. *Wiltzie v. Ward*, 549.

3. Where the claim was upon the following document: "Received from R. W. an order from C. B., ordering me to pay him the sum of \$140, which is accepted on the following conditions, providing he carries out his agreement with me as cheese-maker." Signed by the defendant.

*Held*, that the Division Court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as it depended upon the happening of certain events with respect to which evidence had to be adduced. *Ib.*

#### DOMINION LEGISLATURE.

*See* TRADE AND COMMERCE.

#### DOMINION RAILWAY.

*See* RAILWAY COMPANY, 1.

#### EMBEZZLEMENT.

*See* "EXTRADITION, 1.

#### EQUITABLE ASSIGNMENT OF PROCEEDS OF GOODS.

*See* CHATTEL MORTGAGE, 1.

#### EVIDENCE.

*See* PRODUCTION OF DOCUMENTS.

#### EVIDENCE, REJECTION OF.

*See* EXTRADITION, 2.

#### EXCESSIVE VALUATION.

*See* PAID VALUATOR.

#### EXTRADITION.

1. The prisoner was a clerk in the employ of the mayor and common council of the city of Newark, (in the State of New Jersey, U. S. A.), a portion of his duties being to receive payment of taxes payable to the city; and on the 18th of November, 1881, a sum of \$562.32, for taxes, &c., due upon certain lands in that city, was paid to him—such sum being included with other taxes in a check of the party assessed for \$4,094. The \$562.32 was composed of three items: costs \$7.70, interest \$72.08, and taxes \$482.54—each of which required to be entered in a separate column of the cash-book belonging to the office of the comptroller. The gross sum, (\$562.32), had apparently been entered first in the column headed "Totals," and subsequently in making the separate entries the sum of \$482.54 was entered as \$282.54, and the figure "3" in the total column substituted; the difference, (\$200), being abstracted by the prisoner from moneys paid to him on that day.

*Held*, [*Per* SPRAGGE, C. J. O., and GALT, J.], that this act amounted to the crime of forgery, and, as such, rendered the prisoner liable to extradition.

[*Per* BURTON and PATTERSON, J.A.], that such alteration was not forgery, though the act amounted to one of embezzlement, and therefore

that the prisoner was entitled to be discharged, embezzlement not being one of the offences for which a party was at the time liable to be extradited under the Ashburton Treaty. *Re Hall*, 31.

2. P. was the superintendent of the Blocksley Alms house, situated in and supported by the city of Philadelphia, U. S. Parties supplying provisions, &c., for the use of the charity were paid by warrants duly prepared and signed by the proper officers thereof. Three such warrants for the payment of certain persons or firms were in the hands of W., the Secretary of the almshouse, to be delivered to them on their respectively signing the stub or counterfoil of the warrants. P., who was well known to the secretary, applied to him for those warrants, stating that he had authority from the several parties to sign for them, which he did accordingly, and W. handed over to him the warrants, which were subsequently cashed at the office of the city treasurer.

P. having fled to this Province, an application was made for his extradition before the Judge of the County Court of Wentworth, when expert evidence was adduced proving that according to the Statute Law of Pennsylvania, as also at Common Law as there interpreted, these facts constituted the crime of forgery :

*Held*, on appeal, *per* SPRAGGE, C. J. O., and PATTERSON, J. A. [affirming the judgment of the Queen's Bench Div. 1 O. R. 586], that the act amounted to the crime of forgery, and so rendered P. liable to be extradited :

*Per* BURTON, J. A., and FERGUSON, J., that in the absence of any suspicion of any complicity of W. in the fraud, the facts would not have made

out the crime of forgery ; but as the evidence afforded ground to infer that W. and P. were in collusion, and had combined together for the purpose of committing the fraud by means of the false documents, and was therefore sufficient to warrant the committal of P. for the crime of forgery at common law, the order for his committal for extradition should be affirmed.

*Per* SPRAGGE, C. J. O.—The forgery which is the subject of the treaty, cannot be confined to the statutory felony of forgery.

*Per* PATTERSON, J. A.—Remarks upon the general right of a person charged before a Magistrate with an indictable offence to call witnesses for his defence, and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime : *Semble*, that the evidence offered, as stated by the case, was not improperly rejected. *In Re Phipps—Extradition Case*, 77.

3. The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice, which on appeal to this Court was affirmed, the Court being equally divided, (*ante* p. 31.) A second writ of *habeas corpus* was thereupon obtained, and the prisoner brought before the Common Pleas Division, when he was again remanded, whereupon he again appealed to this Court, which appeal was dismissed with costs, as under such circumstances a second appeal could not be entertained.

*Per* HAGARTY, C. J., (*SPRAGGE*, C. J. O., concurring). The prisoner having already appealed to this Court from the judgment of the Chancery Division, he must abide by the legal result of such appeal,



viz., the dismissal of it and consequent affirmance of the decision appealed from, and he could not again ask the interference of this Court on the same state of facts.

*Per* BURTON and PATTERSON, JJ.A. The grounds for the technical rule of practice of the House of Lords on an equal division have no existence in other appellate tribunals, although in the particular case, the appellate Court is the Court of last resort. The effect of an equal division in this Court, as in a Court of first instance, is simply that the rule or motion drops or the appeal is dismissed, and the judgment below remains undisturbed, but is not considered as a binding authority.

The Act 29-30 Vict. ch. 45, apparently substituted the right of appeal in *habeas corpus* cases for successive applications from Court to Court.

*Per* PATTERSON, J. A. By the effect of the Judicature Act, a decision of any one division is a decision of the High Court, this matter had therefore been already disposed of on the former appeal. *Re Hall*, 135.

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## FENCE, OBLIGATION TO.

See DISTRESS DAMAGE FEASANT.

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## FIRE INSURANCE.

The plaintiff having created a mortgage in favour of a loan company, whereby he covenanted to insure the buildings on the property, failed to insure, but assented to an insurance effected by the company in their own name, and repaid them the premium. The premises insured were described as a "two story house, shingle roofed building \* \* owned

and occupied \* \* as a steam bending factory." The property having been destroyed by fire, the insurance company paid to the loan company the amount due to them, and took an assignment of their mortgage, whereupon the plaintiff instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due on the mortgage after crediting the amount of insurance.

It was shewn that the premises, instead of being used as a steam bending factory, had been converted into a door and sash factory; of which change no notice had been given to the insurance company.

*Held*, reversing the judgment of the Court below, that the special survey set out in the case, in which the intention to use the premises as a factory was mentioned, did not form part of the application or policy and could not be construed as an assent by the defendants to such occupation: that the statutory condition as to change of occupation or use of the buildings without notice to the insurance company had therefore been broken, thus invalidating the policy; and that the plaintiff was not entitled to any benefit thereunder.

*Held*, also, that the insurance company were at liberty to set up this defence, though between them and the mortgagees the policy was, by a subrogation clause therein made unconditional. *Howes v. The Dominion Fire and Marine Ins. Co*, 644.

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## FORGERY.

See EXTRADITION, 1, 2.

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## FRAUD.

See PAID VALUATOR.



## FRAUDULENT CONVEYANCE

D., the purchaser of land in 1865, gave a mortgage thereon to A., the vendor, to secure part of the purchase money. Taxes were allowed to accumulate, for which the land was sold, and D. became the purchaser in 1868. In 1872, D. made conveyances of his other land and personal property to his two sons, each of whom gave back a mortgage to secure the maintenance of D. and his wife, and the payment of certain sums to other children. No claim was made on the mortgage given by D. until 1876, and the plaintiff, claiming as assignee of A., recovered judgment against D. in June, 1878, on the covenant. In the same year, in order to defeat this judgment, the mortgages made in 1872 to D. were released and new mortgages made to his wife securing substantially the same provision.

The plaintiff having obtained a decree in the Court below to set aside the transactions of 1872 and 1878, as fraudulent against creditors, such judgment was reversed on appeal.

*Per* BURTON and PATTERSON, J.J. A., the transaction of 1872, upon the evidence, more fully set out in the case, was not fraudulent, for it was not voluntary, but brought about by pressure on the part of the sons, and was for valuable consideration; the mere fact, therefore, if it were shewn, of creditors being delayed, would not dispense with proof of intent to delay, &c., and there was no sufficient proof of such intent, either on the part of the father or sons, and certainly not on the part of the latter, which was essential, for the evidence went to shew that this debt, which was the only one, was neither known nor apprehended.

*Per* BURTON, J.A.—The allegation in the bill that the plaintiff was a creditor in respect of a debt existing before 1872, was not proved, for there was no sufficient proof of any assignment to the plaintiff, of which the judgment was no evidence, and a deed of the land by the mortgagee, A., to the plaintiff, would not operate as an assignment of the debt or of the mortgage; nor was it sufficient to shew the mortgage, and that the judgment was for the money secured by it.

*Per* PATTERSON, J.A.—Proof of the assignment was immaterial, for the plaintiff had judgment for the mortgage debt, and if the intent to defeat such debt had been shewn, the grantees of the land could not question the execution plaintiff's title. *Allan v. McTavish*, 440.

## FRAUDULENT PREFERENCE.

1. By an assignment, for benefit of creditors, of all the real and personal estate of the assignors, the assignee was empowered to sell the property assigned "by auction or private contract, as a whole or in portions, for *cash or on credit*, and generally on such terms and in such manner as he shall deem best or suitable, having regard to these presents," and the trusts were declared to be, (1) for the payment of expenses, (2) to retain a reasonable compensation, based upon the time and trouble bestowed in and about the trusts, (3) after a just and equitable distribution of the expenses as between partnership and separate estate, "to pay and divide the residue of the partnership estate and the surplus of the separate estates unto and among all and every the credi-

tors of the said partnership, according to the amount of their respective claims ratably and proportionably; and the respective separate estates (less proportion of the costs, charges, expenses, and allowances), and any surplus of the partnership estate, unto and among the separate creditors respectively," and it was provided that the assignee "shall only be answerable or chargeable for wilful neglect or default."

*Held*, affirming the judgment of the Court below, that the deed could not be impeached as a fraudulent preference of creditors within the Act R. S. O. cap. 118. *Badenach v. Slater*, 402.

2. One S., a trader, who was in embarrassed circumstances, on consultation with W., one of his creditors, was advised by him to make an assignment of all his stock in trade and effects which he did to his wife, in whose name the business was afterwards carried on, she obtaining from the plaintiffs goods on her own credit; and on the plaintiffs agreeing to settle the claims of two other creditors, which they did, she executed to them a chattel mortgage on all the effects in her shop. The sheriff having seized the goods under an execution at the suit of another creditor, the plaintiffs instituted interpleader proceedings.

*Held*, that the mortgage to them was a fraudulent preference, and as such void against creditors. *Boyd et al. v. Glass*, 632.

*See also* HUSBAND AND WIFE.

#### GUARANTY OF PART OF INDEBTEDNESS.

The defendant, in order to enable one G. to carry out a contemplated

settlement with the plaintiffs—creditors of G.—signed a memorandum guaranteeing the payment by G. of the first two of three promissory notes of \$751 each, "to the extent of \$751." When the first note to mature fell due G. was unable to meet it, and the defendant, without the knowledge of the plaintiffs or their agents, enabled G. to raise a part of the amount required to retire that note, which amount G. so applied; and this sum the defendant subsequently was compelled to pay.

*Held*, [affirming the judgment of the Court below, 46 U. C. R. 365,] no answer to a claim afterwards made upon the defendant to pay the second note on G.'s failing to do so, the advance which had been so made by the defendant to G. forming no part of the sum the defendant was liable for under his guaranty. *Crathern et al v. Bell*, 537.

#### HABEAS CORPUS.

*See* "EXTRADITION," 3.

#### HIGH COURT, APPEAL FROM.

*See* "EXTRADITION," 3.

#### HIGH SCHOOL BOARD.

On the 29th April, 1878, the Board of Education of the incorporated Village of Morrisburgh, which was formed by the union of the High School Board, of High School District No. 4, of the United Counties of Stormont, Dundas and Glengarry, and the Public School Board of the Village of Morrisburgh, in which village the High School was situated, resolved that the sum of

\$7,000 should be levied on High School District No. 4, to cover the expense of building, furnishing, &c., for purposes of the High School.

*Held*, that the joint board, and not the High School Board, was the proper body to make the requisition for the money, under 37 Vict. ch. 27, sec. 63; adopting the construction put upon that section in *Re Perth*, 39 U. C. R. 34, which had been confirmed by implication by 42 Vict. ch. 34.

The county council of the united counties, acting under 37 Vict. ch. 27, sec. 38, which gave power to every county council from time to time to determine the limits of a high school district for each high school existing in the county and within its municipal jurisdiction, had, on 23rd June, 1876, by by-law No. 516 declared that district No. 4 should consist of the village of Morrisburgh and the townships of Williamsburgh and Winchester. Section 38 was repealed by 40 Vict. ch. 16, sec. 18, which, however, declared that all high school districts which existed at the time of its passing (*viz.*, 2nd March, 1877), should continue until the county council should think fit to discontinue them. On 12th October, 1877, the county council passed by-law No. 551 in which, after reciting, *inter alia*, that it was expedient to consolidate all acts and by-laws of those counties which in any way related to high school districts, proceeded in direct terms to repeal several by-laws including No. 516, and then went on to enact that the united counties should be divided into five districts for high school purposes, No. 4 and No. 5 being in the county of Dundas, and No. 4 embracing Williamsburgh, Winchester, and Morrisburgh.

*Held*, that although the reconstruction of the districts was *ultra vires* and void, because the power to determine the districts had ceased at the passing of 40 Vict. ch. 16; yet the repeal of by-law 516, being within the power to discontinue the districts which that statute preserved, was valid, and the township of Winchester had therefore ceased to be part of district No. 4 before the resolution of April, 1878, was passed.

The board of education, acting under the resolution of April, 1878, had on 19th July, 1878, made a demand upon the township of Winchester for its proportion of the money required. Before that demand was made another by-law, No. 590, had been passed on 22nd June, 1878, by the county council, repealing that portion of by-law No. 551, which related to high school districts for high school purposes in the county of Dundas, and enacting, *inter alia*, that district No. 4 should embrace the village of Morrisburgh only. This by-law was passed after a majority of the reeves and deputy reeves of the county of Dundas had, under the power given by 41 Vict. ch. 15, requested the county council to abolish the districts Nos. 4 and 5, and to constitute the corporation of the village of Morrisburgh High School District No. 4.

*Held*, that this by-law was effectual to abolish district No. 4, if that district had continued to exist after the passage of by-law No. 551.

When the demand was made in July, 1878, by-law 590 was in force. It was moved against in the Court of Queen's Bench in November, 1878, and was quashed so far as it assumed to determine the limits of districts, but not so far as it repealed by-law No. 551. (*Chamberlain v. Stormont*, 45 U. C. R. 26)

On 27th June, 1879, the county council passed another by-law, No. 617, simply abolishing the existing high school districts in the county of Dundas. At this time no part of the money demanded had been levied. This by-law was passed after the rule *nisi* for a mandamus in the matter had been granted, but before it was argued.

*Held*, agreeing with GALT, J., who had discharged the rule *nisi* for a mandamus, and with HAGARTY, C. J., who dissented from the judgment of the majority of the Court of Queen's Bench (45 U. C. R. 460), that if the demand had been originally valid, it could not be enforced after the passage of by-law No. 617, and nothing would have remained in question but the costs of the application. *Re Board of Education of the Village of Morrisburgh, and the Municipal Corporation of the Township of Winchester*, 169.

#### HUSBAND AND WIFE.

The plaintiff was married in 1876 without any marriage contract or settlement, being possessed of about \$1.500 derived from the estate of a former husband, which she lent at different times to her husband, directly, or in paying his debts a small portion having been lent prior to their marriage. In January, 1879, on a further advance of \$200, she obtained from her husband a chattel mortgage of certain goods, farm stock, implements, and other chattels, which was duly registered but not renewed. In November, 1879, she insisted upon and obtained from her husband a bill of sale and other goods, for the expressed consideration of \$300. The plaintiff and her hus-

band continued to reside together, and apparently he had the use of the goods in much the same way as prior to such bill of sale being made, she and her sons working the farm on which the parties resided, and which had been conveyed by her husband to a trustee for the benefit of the plaintiff, the husband working or not as pleased himself. The evidence established the *bona fides* of the claim set up by the plaintiff, and for the purpose of securing a creditor of the husband she executed a chattel mortgage in her own name on the goods.

*Held*, (affirming the Judge of the County Court, York), that the bill of sale and chattel mortgage were not open to objection as being given direct to the wife by the husband; and that even if her title under the chattel mortgage could not be supported for want of a sufficient change of possession, she could claim under the bill of sale, which being obtained by pressure was not a fraudulent preference under R. S. O. ch. 118. *Totten v. Bowen*, 602.

#### INCORPORATED FOREIGN COMPANY.

The defendant company was a foreign corporation, whose directors had authority to appoint such subordinate officers as the business of the corporation might require. By power of attorney under the corporate seal, they appointed a general agent at Toronto, to take charge of, conduct and manage the business of the agency at Toronto, and of its sub-agencies, giving him power to do everything necessary and requisite to all intents and purposes as fully as the company could do. He appointed the plain-

tiff a sub-agent for a year, and at the end of that and each succeeding year he renewed the appointment for a year. The plaintiff was paid \$15 a week and a commission on sales. He was summarily dismissed. Evidence was given for the defence that the corporation were in the habit of appointing their agents and sub-agents at will.

*Held*, SPRAGGE, C.J.O., dissenting, [affirming the judgment of the Court below refusing an order *nisi* for a non-suit,] that the appointment from year to year was clearly within the authority of the directors, that the general authority was delegated to the general agent, and that the plaintiff had a right to rely on the authority so given when he entered into the engagement.

*Per* SPRAGGE, C.J.O. Though the defendants acquiesced in the appointment of the plaintiff, there was no acquiescence in the terms of the appointment, and it appeared that their practice was to engage their agents at will only. The power of attorney, if it gave power to appoint sub-agents at all, did not give power to appoint them by the year; and the general agent was not held out by the company as having any such authority. *Howarth v. Singer Manufacturing Co.*, 264.

## INDEPENDENT INQUIRIES BY COMPANY.

*See* LIFE INSURANCE.

## INSANE DELUSION.

*See* WILL, 1.

## INSOLVENT ACT.

After payment by an insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee.

*Held*, [reversing the decision of the Court below] that notwithstanding the provisions of sec. 99 of the Insolvent Act, interest was payable on all debts originally bearing interest by contract or otherwise, but not where it was claimable by law as damages only.

*Held*, also, that the claim to such interest was properly brought before the Court by petition filed by the inspectors, who, acting under a resolution of creditors, had requested the assignee to pay such interest. *In re McDougall*, 309.

## INSURANCE.

The first statutory condition indorsed on a policy provided that if the insured misdescribed his buildings or goods to the prejudice of the company, or misrepresented, or omitted to communicate any material circumstances, the insurance relating thereto should be void. The second statutory condition provided that the policy was intended to be in accordance with the application unless the company should point out the difference relied on, with a variation added thereto, that such application, or any survey, plan or description of the property to be insured should be considered a part of the policy and every part of it a warranty by the insured, but that the company would not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. The twentieth statutory condition as

varied, provided that in case any agent of the company took part in the preparation of the application, he should, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant. By the application, which was signed, not by the insured in person, but through the agent of the company, the insured was required to make known the existence of all buildings within 100 feet of the insured premises; and it appeared that the insured had omitted to make known the existence of a small building used for storing coal oil, and material to be made known, within such distance, but of the existence of which the applicant was not at the time aware. A diagram was made and filled in by the agent and signed by him in his own name as well as that of the applicant, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection and the knowledge thereby acquired, as also an intimate knowledge of the property, which he passed three times each day; and the agent at the foot of the application stated that he had made a personal survey of the risk.

*Held*, [reversing the judgment of the Court below, 31 C. P. 618] that under the conditions and circumstances above set forth the insured was relieved from the effect of his omission to make known the existence of such coal oil shed; that the inspection by the agent need not be one made for the purpose of such insurance, provided a personal inspection did take place; and that under the facts and circumstances appearing in the case the company could not dispute the correctness of

the answers given by the insured, whether his answers upon the application for insurance were to be treated as warranties or representations only. *Quinlan v. The Union Fire Insurance Co.*, 376.

### INTEREST ON CLAIMS.

The 43rd section of the Court of Appeal Act, which provides "when on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the Court below is in favour of the defendant, and is reversed on appeal. In such case the Court, on reversing the judgment, gave liberty to the appellant, the plaintiff in the Court below, to move to be at liberty to enter judgment as directed by this Court, *nunc pro tunc*, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favor. *Quinlan v. The Union Fire Ins. Co.*, 376.

See also INSOLVENT ACT.

### INTERPLEADER.

G. had recovered a judgment against his father for costs in an action instituted by the latter, and under the execution issued thereon seized a horse as the property of the father in the possession of the plaintiff A., another son. It was shewn that several years before the father had agreed to convey his farm to A. and another brother W. both of whom assumed possession and control of



the property before any conveyance was executed, and so continued in possession, the father continuing to reside on the place with the two sons, part of the consideration for the conveyance being that they should support him. The sons also bought the chattel property from their father, the horse in question having been purchased by A. for \$50, and this he kept upon the premises as had always been done, using him in the work of the farm, and occasionally working for others with him for hire, the father sometimes using him for his own purposes. On this state of facts, the Judge of the County Court of Hastings in an interpleader issue, left the question of property to the jury, who found a verdict for A.

The Court being of opinion that the claim of G. having arisen long after the alleged sale of chattels, it would require a preponderance of evidence in favour of G., to induce the Court to interfere with the finding of the jury (but which did not exist) refused to disturb the conclusion of the Judge as to the finding of the jury, and dismissed an appeal, with costs. *Danford v. Danford*, 518.

#### INVALID SALE.

[*By reason of improper assessments.*—See LAND TAX, 1.

#### ISSUE, DEATH WITHOUT.

See WILL, 3.

#### JUDGMENT NUNC PRO TUNC.

See INTEREST ON CLAIMS.

#### JUDGMENTS IN APPEAL, HOW ENFORCED.

See APPEAL, &c.

#### JUDICATURE ACT.

1. The Judicature Act and rules in relation to procedure do not apply to the Division Courts; and Rule 330 of the Supreme Court of Judicature applies only to the Courts to which in terms it is made applicable. *Bank of Ottawa v. McLaughlin*, 543.

2. An action having been tried before a Judge with a jury, the judgment was directed to be entered by the Judge upon the answers to questions put by him to the jury, and the damages were assessed by the jury. The defendants subsequently moved before the three Judges of the Divisional Court to set aside the judgment directed to be entered, but the Divisional Court, when giving judgment upon the motion, consisted of two Judges only, one of them being the Judge at the trial.

*Held*, that a Court so constituted had by reason of sec. 29, sub-sec. 5 of the Judicature Act, no power to give Judgment, and there being therefore nothing to appeal from, leave to appeal was refused. *Cochrane v. Boucher*, 555.

#### JURY ANSWERING QUESTIONS.

The new system of calling upon juries to reply to specific questions considered and discussed, and,

*Per* HAGARTY, C. J. questioned. *Canada Central Railway Co. v. McLaren*, 564.

## JURY.

*Withdrawing case from.] — See NEGLIGENCE, 1.*

## LANDLORD AND TENANT.

By a verbal agreement, entered into in June, 1876, the plaintiff leased to his son, M., who was residing with him, the farm occupied by them, for five years, at an annual rent of \$100, M. agreeing also to support the plaintiff and the other members of his family. By the terms of the agreement M. was to have the use and enjoyment of the stock and implements on the premises, estimated to be worth \$1.010. It was also stipulated that M. should have power to sell or otherwise dispose of such portions of the stock and implements as he might think desirable, but at the conclusion or sooner determination of the term, he was to leave others of equal value, any surplus above that amount to be his own. Either party was to be at liberty to determine the lease at any time he thought fit to do so. In January, 1879, M. having become financially embarrassed, and finding he was losing by the farm, expressed his determination to try some other mode of life, and said that the plaintiff might have the place and the stock, &c., thereon, if he, the plaintiff, would discharge him from any claim in respect of the rent, no portion of which had been paid. M. did accordingly abandon the place, and the plaintiff thereupon assumed the management and control thereof, and took possession of the stock, &c. M. subsequently returned to his father's, and continued to reside and work on the farm for his father. In March following M. executed a surrender

to the plaintiff of all his right and interest in or to the farm and the crops upon it. In the month of April, for the expressed consideration of \$340, which it was alleged his father had lent him, he also executed a memorandum assigning to the plaintiff all his interest in the stock and farming implements, &c., on the place, which included, it was said, a buggy, cutter, and harness, which had been purchased by M. for his own use.

In October, 1879, the defendant sued out execution against M., under which the sheriff seized the farm stock, and implements, together with the said buggy, cutter, and harness. In an interpleader proceeding by the father, a verdict was rendered for the plaintiff. On appeal from a rule refusing to set such verdict aside.

*Held*, that the lease from the father to his son had the effect of vesting the chattel property in the latter; and

*Quære*, whether it was afterwards revested in the father by the writings executed by M.; but as the question whether there had been a delivery and change of possession sufficient under the Bills of Sale Act had not been passed upon by the jury, and as some doubt existed in respect of the buggy, cutter, and harness, a new trial was ordered; costs to abide the result. *Oliver v. Newhouse*, 122.

## LAND TAX.

1. The assessment of four lots containing about 400 acres in the name of the plaintiff embraced seven acres already sold and separately assessed, of which fact the assessor was aware. The defendant purchased at a sale for taxes, and the



plaintiff instituted proceedings impeaching the sale within two years thereafter.

*Held*, affirming the judgment of the Court below, that the assessment was illegal and vitiated the sale. *Fleming v. McNabb*. 656.

2. The defendant had for some years acted for the plaintiff in looking after his lands, and paying the taxes; but in 1874, they had some difficulty, and from that time the plaintiff ceased to correspond with the defendant, and employed one H. to pay the taxes, and look after the property.

H. without any instructions from the plaintiff, on one occasion wrote to the defendant requesting him to ascertain the amount of the taxes, and to draw upon him therefor, with which request the defendant complied, but nothing further occurred to change the relative position of the parties before the sale:

*Held, per* BURTON, J. A.—That under these circumstances the confidential relations which had previously existed must be held to have ceased, and that the defendant was not precluded from purchasing at the sale for taxes.

*Per* PROUDFOOT, J.—That what took place could not have the effect of determining the fiduciary relationship between them, and therefore the defendant could not purchase the plaintiff's land to his prejudice. *Ib.*

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#### LEASE OF FARM WITH RIGHT TO SELL OR USE STOCK.

*See* LANDLORD AND TENANT.

#### LEAVE TO APPEAL

*See* JUDICATURE ACT, 2.

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#### LIFE INSURANCE

The manager of the defendant company, entertaining doubts as to the propriety of accepting A. R.'s application for a risk on his life, caused the local agent of the Company to make further inquiries as to A. R.'s habits, &c. On receiving a satisfactory report from the agent a policy was issued.

*Held*, That the defendants were not thereby precluded from relying upon the written application of A. R. and shewing that it contained wilfully untrue statements, the effect of which was by the express stipulations thereof sufficient to avoid the policy.

The judgment of the Court below, in other respects, 32 C. P. 256, affirmed. *Russell v. Canada Life Assurance Company*, 716.

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#### LOCUS STANDI.

*Quære*, whether the appellant, whose only interest was that of mortgagee of S.'s interest, had any *locus standi* to bring a suit for partition, or to appeal without his co-plaintiff. *Laplante v. Scamen*, 557.

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#### MARRIED WOMAN'S ACT.

In order that the property of a married woman who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate and apart from her husband, or that the business should be

carried on in a house other than that in which the husband and his wife reside. *Murray v. McCallum*, 277.

The plaintiff, who was possessed of a sum of money (about \$300), felt dissatisfied with her husband's management of his business, his goods having been sold under execution for debt whilst residing on a rented farm, the sale not realizing sufficient to pay the arrears of rent and his debts; leaving, in fact, unpaid the debt for which the defendant in the present action had obtained execution. The husband had literally no means, and the plaintiff resolved to start hotel-keeping, and agreed to give her husband \$15 a month for his services as bar-keeper, the duties of which he discharged, and resided with her in the hotel. It was shewn that whilst thus engaged she had two partners in carrying on the hotel business. The defendant seized the goods in the hotel, and in an interpleader issue a verdict was rendered in favour of the plaintiff, which the Court in *banc* refused to set aside. On appeal to this Court.

*Held, per* SPRAGGE, C. J. O., and CAMERON, J., that the facts shewed the plaintiff to have had a separate trade or occupation within the Act, the husband not having control of the business, but being hired for a particular duty.

*Per* BURTON, J. A.—It was not intended that there should be an inquiry under the Act as to the *bona fides* of such transactions; but that the fact of the husband's interference with the concurrence of the wife, deprived it at once of its separate character.

*Per* BURTON and PATTERSON, JJ. A.—That the interference of the husband with the business, as shewn

by the evidence, was such in reality as to prevent its being treated as the business of the plaintiff. *Ib.*

## MASTER AND SERVANT.

1. The plaintiff renewed his engagement for a year with the defendant company at Hamilton, to serve them in the capacity of book-keeper. Before the expiry of the time agreed for P., one of the managers of that branch of the company, removed the books from the possession of the plaintiff, placing another in charge thereof and telling the plaintiff that he did not any longer require his services, but that if W., another officer of the company, had anything for him to do outside he would be very glad, adding "But I have no further service for you in the office, in fact I do not want you in the office." The plaintiff refused to recognize the right of P. to thus remove him, and it was arranged between plaintiff, W. and P., that plaintiff should remain occupying his time with other work until it was ascertained from the head office if P. had the authority he asserted; and on obtaining information in the affirmative, plaintiff left.

*Held*, affirming the judgment of the Court below, that the action of the defendants was a dismissal of the plaintiff. *Lash v. The Meriden Britannia Company*, 680.

2. On the appeal the defendants urged amongst other grounds, one not taken in the rule *nisi* or raised by the pleadings, namely, that the evidence disclosed good cause for dismissal. When offered the opportunity at the trial to amend and raise such defence, counsel for the defendants declined to do so.

*Held*, that the defence could not be raised on appeal. *Ib.*

### MISDESCRIPTION OF STATE OF PROPERTY.

*See* VENDOR AND PURCHASER.

### MORTGAGE, MORTGAGEE, MORTGAGOR.

*See* FIRE INSURANCE. — LOCUS STANDI.

### MUNICIPAL CORPORATIONS.

The defendants agreed, subject to certain tests and approval, to purchase from the plaintiffs a steam fire engine, which it appeared, it was desirable the municipality should possess; but, on submitting a by-law, for that purpose, to the ratepayers for approval, the same was rejected, although an informal by-law had been previously approved of by them. Meanwhile the engine had been received by the defendants, and by them subjected to the necessary tests, which being satisfactory, they, by a minute in council, agreed to accept the engine, and the same was placed in their engine-house, subject to the customs duties thereon.

A few days after, on ascertaining the result of the voting, the defendants communicated the same to the plaintiffs, rescinded the resolution, and requested them to remove the engine, which the plaintiffs declined to do, and sued for the price of the engine.

*Held*, [affirming the judgment of the Court below, 31 C. P. 301,] that the plaintiffs were not entitled to recover; the contract for the purchase

of the engine not having been under seal, and there having been no formal acceptance of it under seal; and the purchase thereof, not being a matter of such minor importance or daily occurrence as should be binding on the corporation without the formality of a seal: and

*Quare*, whether the defendants would necessarily be liable upon a contract not under seal, even where the benefit of it had been actually enjoyed, unless in cases where the thing ordered was actually and urgently required, or "for work, which, if the corporation had not ordered, they would not have done their duty."

*Pim v. Ontario*, 9 C. P. 304, remarked upon.

*Silsby v. The Corporation of the Village of Dunnville*, 524.

### MUTUAL INSURANCE COMPANIES.

*Held*, [reversing the decision reported 9 Pr. R. 185, which followed the decision in 8 Pr. R. 433], that R. S. O. ch. 151, sec. 61, providing, as to mutual insurance companies, that no execution shall issue against such company upon any judgment until after the expiration of three months from the recovery thereof, does not apply where the judgment has been recovered on a policy issued by the company on the cash principle. *Lount v. The Canada Farmers' Ins. Co.*, 8 Pr. R. 433, overruled.

*Lowson et al. v. The Canada Farmer's Ins. Co.*, 613.

### NEGLIGENCE

1. A portion of a highway which the defendants were bound to keep

in repair had a trench running across it caused by water escaping from a culvert, and was allowed so to continue out of repair for a month. The deceased while lawfully travelling along the road which he had passed over the day before, attempted to cross such trench in a waggon, from which he was thrown and killed. In an action for damages, it was alleged by the defendants that deceased was well aware of the defect in the road, if any, and at the time of the accident was intoxicated, and thus contributed to the accident. It was left to the jury to say whether the deceased had so contributed to the accident, that but for want of reasonable care it would not have occurred. The jury answered this in the negative, and rendered a verdict in favor of the plaintiff.

*Held*, [affirming the decision of the Common Pleas Division, who refused a rule nisi to enter a nonsuit], that the question of contributory negligence was one for the jury, and could not have been withdrawn from them. *Maw v. Townships of King and Albion*, 249.

2. In an action of negligence for the destruction by fire of a quantity of lumber owned by the plaintiff, and which by leave of the defendants he had piled close to their track, caused, as the plaintiff alleged, by sparks emitted from the smoke stack of one of the locomotives belonging to the defendant company, the jury at the trial found that the fire was caused by the imperfect or defective construction of the smoke stack, the cone being placed too close to the netting, and by reason of the bonnet rim not fitting sufficiently close to the bed. Upon a motion in *banc* to set aside the verdict entered for the plaintiff, the Court, upon the evi-

dence set out in the case (32 C. P. 324), *Held* that the finding of the jury was fully supported thereby, and on appeal to this Court from that decision, the Court being equally divided, the judgment was affirmed, and the appeal dismissed, with costs. *The Canada Central R. W. Co. v. McLaren*, 564.

3. After the occurrence of the accident which caused the destruction of the plaintiff's lumber, B. an engine driver of the defendants, and who was in charge of the locomotive (No. 5) on the day the fire occurred, made an entry in what is termed the repairs-book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight \* \* Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of the plaintiff, and proved his having made such entry in the usual course of his duties.

*Per* SPRAGGE, C. J. O., and HAGARTY, C. J., such entry was properly produced and read to the jury.

*Per* BURTON and PATTERSON, JJ. A., such entry or report was merely a narrative of a past occurrence, or something in the opinion of B. requiring attention, and in any view could only be receivable as evidence against the company, if at all, upon proof of B.'s death. *Ib.*

4. With a view of shewing that engine No. 5 was defectively constructed, evidence was given that on previous occasions when it was in the same or an improved condition, it had thrown out sparks causing fires:

*Per* SPRAGGE, C. J. O., and HAGARTY, C. J., such evidence was properly receivable. *Ib.*

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NEW TRIAL.  
See PAID VALUATOR.

**NO FUNDS.**

*See* PROMISSORY NOTE

**NONSUIT.**

At the trial the plaintiff elected to take a nonsuit, and the Judge refused a new trial.

*Held*, that plaintiff was entitled to move to set aside the nonsuit, and if refused could appeal therefrom. *Bank of Ottawa v. McLaughlin*, 543.

*See also* NEGLIGENCE, 1.

**OBLIGATION TO FENCE.**

*See* DISTRESS DAMAGE FEASANT.

**OFFER TO DELIVER IRON OF A DIFFERENT BRAND FROM THAT PURCHASED.**

*See* AGREEMENT, &c.

**OMITTING TO POINT OUT OBJECTIONS TO PLEADINGS DEMURRED TO.**

When upon the argument of an appeal, the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the Court refused to wade through the mass of pleading which had been filed in the Court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of the Court below upon such pleading. *Quinlan v. The Union Fire Insurance Co.*, 376.

The unnecessary and improper length of pleadings remarked upon. *Ib.*

**PAID VALUATOR.**

In order to render the paid valuator of a loan company answerable for a loss caused by excessive valuation of property, it is not necessary to shew that such valuation is made fraudulently.

The Court below dismissed a bill filed to enforce a claim for damages sustained by an excessive valuation of land by the brother and partner of the paid valuator duly appointed by the plaintiffs, on the ground that it was not shewn that the valuation was made fraudulently. This Court, while differing from such view, declined to reverse the decree and ordered a new trial, at which the evidence of one of the defendants already taken might be used, in the event of his then being out of the jurisdiction; but ordered the defendants to pay the costs of the appeal; the new trial to be without costs in the Court below.

*The Canada Landed Credit Co. v. Thompson et al*, 696.

**OVERPAID SHARES.**

*See* "WILL," &c., 4.

**PAYMENT OF MONEY INTO COURT.**

*See* VESTING ORDER.

**PER CAPITA OR PER STIRPES**

*See* WILL, 4.

PERIOD FOR PAYMENT OF  
SHARES OF ESTATE.

*See* WILL, 4.

PLEADING.

1. The plaintiff lent P. a sum of money, for securing the repayment of which P. gave a chattel mortgage on goods, which P. was to retain possession of; and the defendant executed a bond, conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and an action having been commenced against the defendant on his bond, he pleaded the fact of such destruction without any default on his part.

*Held*, bad on demurrer, for not negativing any default on the part of P.

[CAMERON, J., dissenting.] *Boswell v. Sutherland*, 233.

2. The judgment of the Court below overruled the demurrer on the assumption that the plea had been amended according to leave given, but the appeal book did not shew the amendment to have been made, and the defence as set out in the printed case was held bad on demurrer, and the appeal by the plaintiff allowed with costs. [CAMERON, J., dissenting, who thought that under the circumstances the plea should be treated as amended pursuant to the leave granted by the Court below, and that the judgment of the Court below, which was in the opinion of this Court right as it was given, should not be reversed.] *Ib.*

POSSESSION, CHANGE OF.

*See* INTERPLEADER.

POWER OF APPOINTMENT.

*See* WILL, 2.

PRACTICE

*See* APPEAL ON QUESTIONS OF FACT—INSOLVENT ACT, 1—JUDICATURE ACT, 2—JURY ANSWERING QUESTIONS—MASTER & SERVANT, 3—NON SUIT—PAID VALUATOR—PRODUCTION OF DOCUMENTS.

PRESENTMENT.

*See* PROMISSORY NOTE.

PRESSURE.

*See* FRAUDULENT PREFERENCE, 2—HUSBAND AND WIFE.

PRINCIPAL AND AGENT.

*See* LAND TAX, 2.

PRINCIPAL AND SURETY.

A married woman signed a note in blank, and gave it to her son, "to be used as he liked." He filled it up for \$1,200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands.

*Held*, [reversing the judgment of the Court below], that the married woman was a surety in respect of the note for her son ; and that the authority to the son as to using the note, did not extend to keeping it afloat after maturity without her knowledge ; and that she had been discharged by the extension of the time of payment. *Devanney v. Brownlee*, 355.

See also ACCOMMODATION NOTE.

### PRODUCTION OF DOCUMENTS.

*Semble*—*Per* SPRAGGE, C. J. O., and PATTERSON, J. A., although a party to a cause may be entitled to call for the production of documents, in order to obtain discovery it does follow that the contents of such documents are in themselves evidence. *Canada Central Railway Co. v. McLaren*, 564.

### PROMISSORY NOTE.

In an action upon an overdue promissory note payable at a particular place, it is not necessary to shew that there were not funds at the place named wherewith to retire the bill ; all that is necessary in such case, even as against an indorser, is to shew presentment, non-payment, and notice of dishonor. *McDonald v. McArthur*, 553.

See PRINCIPAL AND SURETY,—STAMPS.

### PROTEST.

See PROMISSORY NOTE.

### PUBLIC INSPECTING BOOKS IN REGISTRY OFFICE

See REGISTRAR OF DEEDS, 7, 8.

### RAILWAY ACCIDENTS' ACT, 1881.

See RAILWAY COMPANY, 1.

### RAILWAY COMPANY.

1. The plaintiff, a workman employed by the Grand Trunk Railway Company, was injured while in discharge of his duties, by reason of his foot having been caught in one of the frogs of the rails which was not packed in the manner prescribed by 44 Vict. ch. 22 (O).

*Held*, that the Grand Trunk Railway being a Dominion Railway, and within sec. 92, No. 10 (a) of the B. N. A. was not affected by the statute which professed only to apply to railway companies in respect of which the Provincial Legislature had authority to enact such provisions ; and therefore, that the defendants were not liable. *Monkhouse v. The Grand Trunk Railway Company*, 637.

2. A receiver of the defendants' railway had been appointed to take the revenues, issues, and profits, to pass his accounts periodically, and to pay into Court the balance due from him after providing for the working expenses and outgoings of the railway. The Master was directed to take an account of all persons entitled to liens, charges, or incumbrances, and to settle their priorities, and the money to be paid into Court was to be paid to such persons according to their priorities to be ascertained.



*Held*, affirming the decision of **PROUDFOOT, V. C.**, that the Master, in taking the receiver's accounts, should have allowed debts paid for working expenses which were not regularly payable until after his appointment, but not those already in default at that time, which were properly payable out of the moneys to be paid into Court according to their priority.

*Gooderham v. Toronto and Nipissing R.W. Co.*, 685.

### RAILWAY CROSSINGS.

The respondents, the plaintiffs in the Court below, were lawfully driving in their carriage along the highway, and when within about 116 feet of the crossing of appellants' railway a train passed, which frightened the horse causing it to turn and upset the vehicle, by which the plaintiffs sustained serious injury. It was shewn that the driver of the locomotive had omitted to give the usual statutory signal, by whistling or ringing a bell, when at a distance of eighty rods from such crossing. In an action brought against the railway company a verdict was found in favour of the plaintiffs, which the Common Pleas Division [**WILSON, C. J.**, dissenting,] refused to set aside. On appeal this judgment was affirmed, and the appeal dismissed with costs [**BURTON, J. A.**, dissenting.]

*Per* **BURTON, J. A.**, the general words used in the statute must, having regard to the general provisions thereof, be intended only for those actually crossing the railway and injured when so crossing, or who in the exercise of reasonable diligence and care, but in endeavoring to escape peril, have sustained injury.

The sounding of the whistle or the ringing of the bell was intended as a warning only to those about to cross the track of railway. *Rosenberger v. The Grand Trunk Railway Co.*, 482.

[Affirmed by the Supreme Court.]

### RECEIVER.

*See* **RAILWAY COMAANY, 2.**

### REFUND, LIABILITY, TO.

*See* **WILL, 4.**

### REGISTRAR OF DEEDS.

1. In an action brought against a County Registrar to recover back alleged overcharges, it was shewn that the plaintiff had called upon the Registrar to search the books and indices in his office, and inform him of the persons named as grantees in the last executed deed of a certain lot; and also what incumbrances there were registered against it. There were 28 entries on the abstract index, and the Registrar charged for these services \$1.45, being at the rate of 25c. for the first four entries, and 5c. for each of the other entries.

*Quære*, whether the Registrar was bound to do, or could recover for doing what the plaintiff required of him; but *Held*, that as he had done it, the charge which the plaintiff had paid, and which was reasonable on the principle of the tariff, could not be recovered back. *Macnamara v. McLay*, 319.

2. The plaintiff told the Registrar that one A. owned a lot in the township of B., but was ignorant as to the number of the lot. and asked the Registrar to tell him what incum-



branches there were against it, which the Registrar did, and charged for those services 25c. for ascertaining the number of the lot, and 25c. for searching for the incumbrances.

*Held*, that both were proper charges. *Ib.*

3. The plaintiff asked to examine an original conveyance in the registry office, informing the officer of the names of the parties thereto, and the lands affected thereby, but did not tell him the number of the conveyance. The Registrar examined the index, for which he charged 25c., and 10c.; for producing the document.

*Held*, also, to be proper charges. *Ib.*

4. The Registrar was required to produce the abstract index of a lot, which contained 180 entries, for which he required to be paid \$2 as for a general search, the plaintiff offering to pay 25c.

*Held*, (BURTON, J.A., and MORRISON, J.A., dissenting,) that the Registrar had charged \$1.75 too much. *Ib.*

5. The Registrar charged \$2.05 for an abstract of five folios—i.e., \$1.20 for searches, the remainder being for copying at the usual rate.

*Held*, the Registrar was entitled to those fees, though he only copied it from the index. *Ib.*

6. A Registrar when preparing an abstract is not bound to rely on the correctness of the abstract index, but may properly test its correctness by making all searches necessary for the preparation of the abstract; he may rely, however, on the index if he thinks proper, and charge the same fees as for searches. But if he gives a certified copy of the abstract

index only he can charge no more than the rate per folio. *Ib.*

7. *Per* BURTON, and MORRISON, JJ.A.—The Registrar is the proper person to make searches, and he must produce the original instruments and the books containing copies thereof only, but not the abstract index. *Ib.*

8. *Per* SPRAGGE, C. J. O., and PATTERSON, J. A.—Every person interested in a lot of land is entitled to see the abstract index thereof for the purpose of making a search, as the book containing such abstract is one of those which the Registrar is bound to exhibit under the Registry Act. *Ib.*

9. *Per* SPRAGGE, C. J. O.—A Registrar, when required to furnish a copy of any document or entry, can make no charge for a search for the original. *Ib.*

*Ross v. McLay*, 25 C. P. 190, overruled in part. *Ib.*

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## REJECTION OF EVIDENCE

*See* EXTRADITION, 2.

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## RENEWAL NOTE

*See* ACCOMMODATION, NOTE —  
PRINCIPAL AND SURETY.

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## REQUISITION FOR MONEY FOR SCHOOL PURPOSES

*See* HIGH SCHOOL BOARD.

RES JUDICATA.

See EXTRADITION, 3.

REVESTING FARM STOCK  
IN LANDLORD.

See LANDLORD AND TENANT.

RIGHT OF WAY.

C., by indenture conveyed land to S., who owned land adjoining other lands of C., but not the land so conveyed, and by the deed C. stated "I further convey the right of way to cross my land \* \* to the land owned by S., \* \* to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of S., his heirs and assigns for ever."

*Held*, that the words employed in the deed were sufficient to pass the interest intended, and that the right of way was thereby made appurtenant to all the lands of S. there situated; not merely to that so conveyed by C.

The judgment of PROUDFOOT, J., 2 O. R. 398, affirmed. *Saylor v. Cooper*, 707.

SALE FOR TAXES.

See LAND TAX, 1.

SALE OF CHATTELS.

See INTERPLEADER.

SALE OF PATENT.

The plaintiff, the owner of a patent for an improved pump which had only about a month to run, but was

renewable for two further terms of five years each, sold the same; together with certain freehold and chattel property, to the defendants for \$4,500, of which \$1,500 was paid down, and a mortgage given on the property for the residue.

*Held*, [reversing the decree of the Court below, PATTERSON, J. A., dissenting], that under the circumstances appearing herein and in the Court below, 26 Gr. 322, all that the purchasers could claim was under the patent for the remainder of the first five years.

*Per* PATTERSON, J. A.—Under the agreement and assignment set out in his judgment, the defendants were entitled to the extension as well as to the current term. *Powell v. Peck*, 498.

SATISFACTION.

See WILL, 5.

SEAL, CONTRACT NOT  
UNDER.

See MUNICIPAL CORPORATION.

SEARCHES, &c., FEES ON.

See REGISTRAR OF DEEDS, 1, 2, 3, 4, 5, 6-9.

SECURITY FOR PAYMENT  
OF NOTE.

See ACCOMMODATION NOTE.

SEIZURE.

See DISTRESS DAMAGE FEASANT.

**SEPARATE PROPERTY.***See* MARRIED WOMAN'S ACT.**SEPARATE TRADING.***See* MARRIED WOMAN'S ACT.**SHARES OF ESTATE, PERIOD FOR PAYMENT OF.***See* WILL, 4.**SIGNALS.***See* RAILWAY CROSSINGS.**SPECIFIC PERFORMANCE.***See* SALE OF PATENT—VENDOR AND PURCHASER.**STAMPS.**

*Held*, that a promissory note, before being negotiated, could be stamped by the maker on the day of the making thereof, though after it had been signed and indorsed by the payee. *Bank of Ottawa v. McLaughlin*, 543.

**STATUTORY CONDITIONS.***See* INSURANCE.**SUBROGATION.***See* FIRE INSURANCE.**TESTAMENTARY PAPER.***See* WILL, 3.**TITLE.***See* VESTING ORDER.**TRADE AND COMMERCE.**

*Per* ARMOUR, J.—The provisions of 34 Vict. ch. 5, sec. 46, are beyond the powers of the Dominion Legislature, as not falling within the denominations, "The regulation of trade and commerce," or "Banking, incorporation of banks, and issue of paper money," in the 91st sec. of the B. N. A. Act referred to, but falling wholly within the denomination; "Property and civil rights in the Province," in the 92nd sec., and being therefore within the exclusive powers of the Provincial Legislature. *Smith v. The Merchants' Bank*, 15.

**TRESPASS.***See* DISTRESS DAMAGE FEASANT.**TRUST FOR BENEFIT OF CREDITORS.***See* FRAUDULENT PREFERENCE.**ULTRA VIRES.***See* TRADE AND COMMERCE.**UMPIRE, NOMINATION OF***See* ARBITRATION, 1.**UNNECESSARILY LONG PLEADINGS.**

The unnecessarily and improper length of pleadings remarked upon. *Quinlan v. The Union Fire Ins. Co.*, 376.

## VARIATIONS.

See INSURANCE.

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## VALUATOR.

See PAID VALUATOR.

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## VENDOR AND PURCHASER.

The decree of the Court of Chan- (28 Gr. 207), affirmed on appeal with costs.

In letters written by the solicitor of a purchaser of land sold at auction it was stated that the advertisement of sale had represented that twenty acres of the land purchased from the defendant had been cleared and fenced, whilst the fact was, no fencing whatever remained on the premises, and by reason thereof claimed compensation, and in his answers thereto the defendant did not deny the fact of sale and purchase, but disputed the right to compensation :

*Held*, a sufficient admission of the fact stated to take the case out of the Statute of Frauds, although no contract of sale had been signed by the vendor. *Stammers v. O'Donohoe*, 161.

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## VESTING ORDER.

One of the defendants in a suit purchased the lands in question upon a sale under the usual decree for partition or sale. The appellant, the plaintiff, was first mortgagee, and the purchaser was second mortgagee of the interest of one S., the owner of an undivided sixth interest in the lands.

*Held*, that the purchaser was entitled to a conveyance from S. with

the usual covenant for title as to his interest, and was not bound to accept a vesting order.

CAMERON, J., *dubitante*, whether the question was not one of conveyance rather than one of title, and whether therefore the purchaser should not be ordered to pay his purchase money into Court. *Laplante v. Scamen*, 557.

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## WAREHOUSEMEN.

1. *Held*, on appeal, (reversing the decree of the Court of Chancery, 28 Gr. 629,) that to bring a transaction within section 46 of the Dominion Banking Act of 1871 (34 Vict. ch. 5) there must be three persons concerned therein; the owner of the goods, some person filling the position of the keeper of a wharf, &c., and the bank (or more accurately speaking, at least two persons, one of whom may act in the dual character of owner of the goods and keeper of a wharf, &c., and the bank), and it is from the holder of the warehouse receipt therein referred to, that the bank is allowed to acquire the document in security, on certain conditions, for advances. *Smith v. The Merchants' Bank*, 15.

[Reversed by the Supreme Court.]

2. *Quære*, whether, from the evidence set out in the case, W. S. was a warehouseman within the meaning of the Act; and as to the effect of the mixture of the coal in question with other coal. *Ib.*

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## WAREHOUSE RECEIPTS.

Warehouse receipts signed by one of the owners of the goods, acknowledged the receipt of the goods *from the bank*, and it was held that they

were not within the Act, and therefore the bank could not claim under them. *Smith v. The Merchants' Bank*, 15.

[Reversed by the Supreme Court.]

See also "WAREHOUSEMEN."

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### WARRANTY.

See LIFE INSURANCE.

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### WAY OF NECESSITY.

See RIGHT OF WAY.

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### WILL

1. The decree in this cause, (28 Gr. 150,) reversed so far as the will was declared void, on the ground of insane delusion. *Bell v. Lee*, 185.

2. The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or to his brother or sister. By his will the testator gave portions, about one-fourth of his estate, to two of his children, and as to the residue he appointed the same to his brother, C. T. B., desiring him to pay, first, his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to a stranger the policy of assurance upon his life for \$3,000, and all moneys arising therefrom.

*Held*, that as to the portions of his estate given to his two children the will was valid; but as to the appointment to his brother, the same

was void as being a fraudulent exercise of the power of appointment; and therefore that as to the residue after payment of the amounts given to the two children the will was inoperative and void, and that as to so much there was an intestacy. *Ib.*

3. Testator by his will gave all his property real and personal, to trustees, directing that his wife should receive all rents and interest during widowhood, and until his youngest child should come of age: that in case of her death or marriage before the youngest child came of age, his property should be divided equally among his children on their respectively coming of age, and in case all his children should die under age without issue, their portions should be divided equally among his brothers and sisters.

A letter was found among his papers addressed to his wife, saying that he had made two wills, "one before I was married, which is to be considered void, but the other I wish to modify, as it was written in a hurry. I wish my dear wife and our children to have all my property, to be divided equally, my wife to have the use of the whole until the children are of age. In the case of death of my children my wife to have the use of the property her lifetime, and then to go to my brothers and sisters."

The testator left two children, who both died under age unmarried, their mother surviving them.

*Held*, reversing the judgment of the Court below, 29 Gr. 274, that the will and letter must be read together, and the will must stand except so far as "modified;" that the "death of my children" referred to their death under age without issue before his wife; and therefore

that she took the personalty (which alone could be affected by the letter) for life, and after her death it would go to testator's brothers and sisters. *Dumble v. Dumble*, 476.

4. The testator bequeathed his residuary estate, all other property, in lands, mortgages, and stocks, to his grandchildren, "the children of J. B., and of my daughter, A. J. B., wife of D. B., share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming to the age of twenty-five years. Provided, nevertheless, that each one, on coming to the age of twenty-five years, receive a portion of not more than half what their share will be on the youngest coming of age." (Then directions were given as to keeping books of account, and managing the estate.) "And when the books so audited shew the revenue of my estate, after paying the before-mentioned bequests, taxes, and other charges on the same, amounts to £500, then half of such revenue or income to be divided, share and share alike, between the families of my son, J. C., and the family of my daughter, A. J. B." (The other half going into the estate.)

*Held*, affirming the judgment of the Court below, that the children referred to, the grandchildren of the testator, took *per capita*, and not *per stirpes*.

*Held*, also, that although the sums overpaid to some of the legatees had been so paid with the sanction of the Court, but in a suit in which infants now claiming were not properly represented, that did not relieve the parties to whom such payments were made from refund-

ing the amount, but under the circumstances, the order for repayment should arrange the mode thereof so as to be as little burdensome as should appear to be consistent with justice to the parties entitled to receive the money. *Anderson v. Bell*, 531.

5. The testator by his will, made in July, 1877, devised to his son G., certain real estate and brewery, expressing that "this devise be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause, "L," the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of \$36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell part of the lands devised to him, including the brewery, to G. for \$27,000, and the brewery plant for \$6,987.20, which was credited on G.'s claim against the testator. G. subsequently, under clause "L," claimed against the estate of the testator payment of the amount for which the brewery premises and plant were sold, he swearing that he was ignorant of the contents of the will. Thereupon the plaintiffs, two of the executors and trustees, instituted proceedings seeking to obtain a construction of the will:

*Held*, (reversing the judgment of the Court below), that the agreement entered into between the father and son superseded the devise to the son. *Archer v. Severn*, 725.

**WITHDRAWING CASE FROM  
JURY.**

*See* NEGLIGENCE, 1.

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**WORKING EXPENSES AND  
OUTGOINGS.**

*See* RAILWAY COMPANY, 2.

**WRONGFUL DISMISSAL.**

*See* INCORPORATED FOREIGN COM-  
PANY—MASTER AND SERVANT.

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**YEARLY HIRING.**

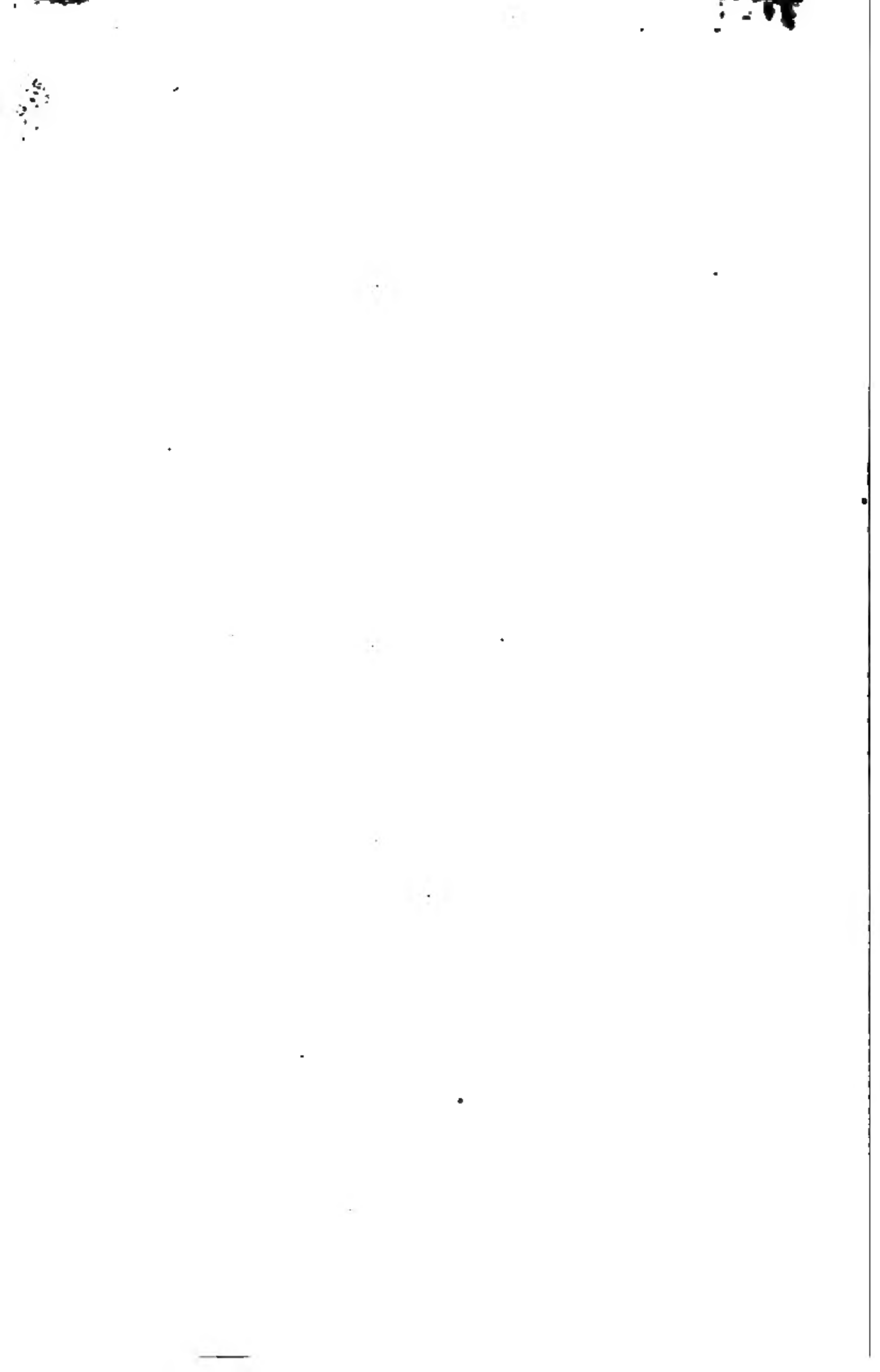
*See* INCORPORATED FOREIGN CO.  
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